NO. 2795

In the

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA JUNEAU GOLD MINING COMPANY

Appellant,

vs.

EBNER GOLD MINING COMPANY, et al,

Appellees.

PETITION FOR REHEARING

J. A. HELLENTHAL.
CURTIS H. LINDLEY.
HELLENTHAL & HELLENTHAL.
Attorneys For Appellants.

NO. 2795

In the

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA JUNEAU GOLD MINING COMPANY

Appellant,

vs.

EBNER GOLD MINING COMPANY, et al,

Appellees.

PETITION FOR REHEARING

J. A. HELLENTHAL,
CURTIS H. LINDLEY,
HELLENTHAL & HELLENTHAL,
Attorneys For Appellants.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Alaska Juneau

~~EBNER~~ GOLD MINING COMPANY, a Corporation,

Appellant,

vs.

EBNER GOLD MINING COMPANY, a Corporation, the ALASKA-EBNER GOLD MINES COMPANY, a Corporation, ANGUS MACKAY, as receiver for the ALASKA-EBNER GOLD MINES COMPANY, a Corporation, and DOWIE, D. MUIR,

Appellees.

PETITION FOR REHEARING

Comes now the Alaska Juneau Gold Mining Company, a corporation, the appellant herein, and respectfully petitions this Honorable Court for a rehearing, and in that behalf represents as follows:

The decision herein was inadvertently rendered before the cause was submitted to the Court.

When the argument was had, counsel for the appellees had not yet completed their brief, and permission was asked to file a brief within a given time after the argument. This request was granted and the time then fixed within which the brief

should be filed was afterwards extended. After the brief of the appellees had been filed, an order was made giving counsel for appellant until February 18, 1917, to file a reply brief. This order escaped the attention of the Court and on February 6, 1917, before counsel had filed a reply brief, the decision was rendered.

This circumstance becomes important in connection with the consideration of a petition for rehearing, in view of the fact that the brief of appellees contained many inaccuracies, both in regard to the facts and the law applicable thereto. A failure to file a reply brief made it appear that all the statements contained in the brief of appellees, both in regard to the facts and the law, were confessedly correct, so that some of the inaccuracies contained in the brief naturally found their way into the decision of the Court.

Again, when the opening brief was prepared, all the arguments that might be advanced by the appellees could not be anticipated, nor could it be foretold what position the appellees would take with reference to the matters presented. It was supposed that the appellees would admit many of the things contended for by the appellant. The record was exceptionally long, and a detailed discussion of every portion of it would result in presenting many matters concerning which there was no issue. Accordingly, the errors relied upon for a reversal were pointed out without attempting to

anticipate anything that the appellees might advance, or attempting to discuss the effect of any position they might take. Had a reply brief been filed, the inaccuracies contained in the brief of appellees would not only have been pointed out, but it would have been shown that the contentions made, at least insofar as they were adopted by the Court, would not entitle the appellees to a decision affirming the decree of the lower Court.

In presenting the grounds and reasons relied upon for a rehearing, therefore, the inaccuracies contained in the brief of appellees, insofar as they found their way into the decision of the Court, will be pointed out and it will be further shown that because of the peculiar facts existing in the case, the decree of the trial Court should be reversed, even though the decision of this Court be regarded as correct in relation to the various matters of both fact and law referred to in the opinion.

The appellant and the appellee, the Ebner Gold Mining Company, are the owners of adjoining groups of mining claims, situate in the vicinity of Silver Bow Basin, near Juneau, Alaska.

Both groups contain deposits of low grade ore that have been worked in a small way for many years. While these activities were not highly profitable in themselves, they served to disclose the existence of ore bodies sufficiently large to admit of large scale operations, which, if properly conducted would so reduce costs as to leave a margin of prof-

it. Accordingly, as early as the year 1899, the appellant commenced formulating plans looking toward the construction of a large milling plant; one of the plans formulated was that of building such a plant on the shores of Gastineau Channel at tidewater and connecting it with the mine by means of a tramway constructed along the hillside until the portal of the present Gold Creek tunnel was reached, thence through a tunnel into the mine. Under this plan it was necessary that the waters of Gold Creek should be applied in connection with the operation of the mill to be constructed. In the year 1900, Mr. F. W. Bradley, now president of the appellant corporation, took charge of its operations; at that time the necessary locations to cover the right of way for the proposed tunnel and the right of way for such diverting works as might be necessary to apply the waters of Gold Creek had already been made. (See evidence, Bradley, record page 352.)

Because of the large outlay required to carry this plan into execution and the low grade character of the ore then disclosed, Mr. Bradley considered other plans for the operation of the plant, carrying forward in the meantime, the work of development and exploration. In the fall of the year 1909, however, he definitely decided to carry out the plan above outlined, and took active steps looking toward its execution. (See evidence Bradley, record page 353, et, seq.) (See evidence Kinzie,

record page 178, et seq.) On December 11, 1909, President Bradley wrote a letter to R. A. Kinzie, who was then acting as Superintendent of the appellant, directing him to locate the waters of Gold Creek at a point below the Ebner water-wheel and at an elevation of between four hundred and five hundred feet above sea level. (See evidence Bradley, record page 357.) (See also letter, page 1954 and letter enclosed therewith, record page 1955.)

Upon receipt of these instructions from President Bradley, Superintendent Kinzie consulted counsel to ascertain what steps were required to carry the directions of Mr. Bradley into effect, (See evidence Kinzie record page 244) and directed R. W. Wayland, who then had charge of the civil engineers in the employ of the company, to survey the flume route. This survey could not be made at that time because of the depth of the snow, but as soon as the weather would permit, Wayland directed one Lindsay, a surveyor working under him, to make the survey. (See evidence Wayland, record page 446.) Accordingly, in the early part of July, which in this locality is as early as that character of work can be carried on on the surface, a line was surveyed from a point on Gold Creek to the shore of Gastineau Channel. This line followed approximately along the same line that is now followed by the flume constructed by the Alaska Juneau Company. Thereupon the necessary rights of way were acquired or located for the proposed

flume and tramway. (See evidence Kinzie, record page 181, also pages 245 and 246.) This done the appellant was ready to go ahead with the construction of the flume, pipe line, etc. and a notice was posted by L. D. Mulligan on the banks of Gold Creek appropriating twenty thousand miners' inches of the waters flowing therein. This notice was posted on August 1, 1910, and Mulligan, in posting the same, was acting as an employee of the appellant and under the direction of its superintendent. (See evidence Kinzie, record page 182.)

Mulligan posted the notice at an indicated point, 150 feet below the mill building situated on the Lotta claim, as he was directed to do by the superintendent. (See evidence Mulligan, record page 144.)

It being the intention to post the notice below the lower side of the Lotta, President Bradley and Superintendent Kinzie measured the distance from the mill building on the Lotta to the lower side ine of the claim along the course of thel creek, using for that purpose the patent plat of the Lotta claim. (See evidence Kinzie, record page 309, also page 256.)

After testifying that he gave Mulligan definite instructions in relation to the point where the notice was to be posted, Superintendent Kinzie testified as follows:

> "A." The point he was told to go to; he was told to measure off a number of feet,

starting at the new Ebner mill and going down Gold Creek; and I took the map and measured off the distance from the new Ebner mill to the lower side line of the Lotta claim—we measured that distance and told him to go up and measure down the creek the required distance, and be sure he went far enough to keep over the end line of the Lotta."

By measuring 150 feet below the mill building along the course of the creek as platted on the official patent plat of the Lotta claim, a point would be reached well below the lower side line of claim. This distance was measured off on the plat and Mulligan directed to make the same measurement on the ground, and post his notice the required distance below the mill. This he did. It afterwards developed, however, that the creek was not correctly platted on the official patent plat; that instead of crossing the claim diagonally in almost a straight line as indicated on the patent plat, the creek made a turn and ran lengthwise with the claim for a considerable distance before crossing the lower boundary, so that if 150 feet were measured from the mill building along the course of the creek, a point would be reached on the Lotta claim a considerable distance above the point where the creek crosses the lower boundary. Mulligan, having taken his measurements in this way, posted the notice on the Lotta claim.

In this connection, the attention of the Court

is directed to appellees' Exhibit "S," found on page 2167 of the record, a map made by J. F. Wettrick, a surveyor in the employ of the appellees, in testifying upon cross examination in relation to Exhibit "S," with reference to the position of the Gold Creek as shown thereon, Mr. Wettrick testified as follows:

"Q" Did you survey that creek yourself, Mr. Wettrick?

"A" Yes, I ran a traverse up and down that creek.

"Q" You put that in yourself from actual measurements upon the ground?

"A" Yes.

"Q" It isn't as it is shown upon the patent plat?

"A" No, it isn't.

The witness was then asked to sketch upon Exhibit "S" the creek as it was platted upon the official plat. This he did, marking the point at which the creek entered the Lotta with the letter "A," and the point where it left the claim with the letter "B"; (these marks are rather indistinct upon the copy as Exhibit "S" appearing in the record, but they appear more plainly upon the original exhibit transmitted to this Court with the record.) (See evidence Wettrick, record page 654, et seq.)

The witness Lindsay, a surveyor in the employ of the appellant, marked on Exhibit "S" with the letter "Q2" the point where the Mulligan notice

would fall, if the creek, as located on the ground, were in the position shown on the official plat. (See evidence Lindsay record page 1429.) In regard to the point marked "Q2," the witness testified as follows:

"Q" That is how many feet below the southern line of the Lotta?

"A" Approximately 50 feet on this map. (See evidence Lindsay, record page 1430.)

The attention of this witness was then directed to the official plat of the Lotta, defendants' Exhibit "T," found on page 2168 of the record. The witness was asked to plat the mill on this exhibit and also to indicate the point where the Mulligan notice would be posted if posted 150 feet below the mill. This done, the witness testified as follows:

"A" It would throw the Mulligan notice on the point marked Y, on Exhibit "T."

"Q" Have you also located the mill on Exhibit "T?"

"A" I have.

"Q" Mark that with the word "mill." Witness does so.

"Q" How far below the Lotta line would the Mulligan notice be there?

"A" Somewhere about 25 or 30 feet. (See evidence Lindsay, record page 1432.) (The copy of Exhibit "T," as it appears on page 2168 is plainer than the copy of Exhibit "S." The Court's attention is therefore especially directed to it.)

The foregoing facts were not disputed by any witness called at the trial, and point out just how and why the Mulligan notice happened to be posted within the exterior boundaries of the Lotta claim. The Court was led to adopt an erroneous conclusion in regard to this matter. The appellant did not post its notice on the Lotta claim because it claimed any portion of that claim under the Oregon location. It may here, however, be noted that at the time the notice was posted it would have been a difficult matter to determine the exact location of the lower line of the Lotta. True, this line had been brushed out at one time, and it is possible that this brushed out line was still visible in 1910, and some old stakes were still in the ground although it might have been a difficult matter to find these because of the density of the brush, but the principal difficulty with the situation arose from the fact that this line so brushed out did not correspond with the southern boundary line of the claim as described in the patent, nor was the claim as marked upon the ground by the stakes so located as to in any manner correspond to the claim as described in the patent. (See evidence Stewart record page 1351 et seq., also 1394) (See also evidence Kinzie record page 662 et seq.)

In subsequent litigation the Court being satisfied that the stakes found in the ground were the original stakes, disregarded the description found in the patent and held that the claim as patent-

ed was the claim as marked by the stakes on the ground. This contention with reference to the location of the Lotta, however, had nothing to do with the posting of the Mulligan notice. In posting the notice the exact boundary between the Oregon claim and the Lotta claim was not considered. It was desired that the notice should be posted below the southerly boundary of the Lotta and the official patent plat of the Lotta was resorted to for the purpose of determining where it could be posted so as not to be on the Lotta claim. The fact that the notice was posted on the Lotta claim was due to a mistake that was made in platting the creek on the official plat and to nothing else.

In this connection it may be pointed out that the Court was also led to adopt an erroneous conclusion with reference to the point at which the Alaska Juneau dam was originally constructed. No dam was ever constructed on the Lotta, nor was any work looking toward the diversion of the waters of Gold Creek ever done on the Lotta. The dam as originally built was below the side line of the Lotta, and so was the intake to the flume. The decision of the Court would seem to indicate that the Court was led to adopt the belief that two dams were built, one on the Lotta and one below it; this is an error. The appellant never built but one dam; its position was never changed.

(See evidence Kinzie record pages 226 and 293)

See evidence Stewart record pages 1346 and 1388)

See evidence Lindsay record pages 852 and 856)

(See evidence Jones record page 490)

(See evidence Hendrick Hendrickson record page 1324)

(See evidence Eli Mackay record page 860)

(See evidence Arthur Kinzie, record 1329)

When the dam was originally constructed, more or less of the brush and timbers that were filled in behind it, extended over the line and were on the Lotta claim as the boundaries of that claim were subsequently determined to be by the Court. It is true a judgment was rendered adjudging the appellees to be the owners of the Lotta as described in the judgment and ordering the appellant to move therefrom; but there was nothing for this judgment to operate upon, except the filling in behind the dam above referred to, and this portion of the dam, if it may in fact be called a portion of the dam, was subsequently removed, but the dam and intake was left in the same position.

(See evidence Kinzie record page 293)

(See evidence Stewart record page 1347)

Prior to the time that appellant's notice was posted, however, the Ebner Company had also formulated plans looking toward the operation of its mine on a larger scale. Its original ten stamp mill, like the original mill of the Alaska Juneau Company, was found to be too small; at first five

stamps additional were added, and later in the year 1897 Mr. Ebner conceived a plan under which the property could be operated on a larger scale. The plan was to erect a new mill on the Lotta. That claim is situated above the intake of the Alaska Juneau flume, so that the use of the water at that point would not interefere with its use by appellant. A mill building sufficiently large to house forty stamps was erected at this point, but the stamps were never installed. (See evidence Ebner record page 1110.)

In the year 1902 negotiations were had between the appellant and the Ebner Company looking toward the purchase of the Ebner property by appellant.

A written report on the Ebner property was transmitted to Mr. Bradley at San Francisco, and in the winter of 1902 and 1903, Mr. Ebner, president of the Ebner Company, called on Mr. Bradley at that place. Because of the fact that Mr. Ebner's maps and data were in his room in the Occidental Hotel, Mr. Bradley went with him from his office to the room where the maps were, and a conference was there held. (See evidence Bradley record page 1632.) At that conference the parties had before them the report previously transmitted to Mr. Bradley (Ex. 38, record page 2003.) This report dealt with the mill building previously erected on the Lotta claim. According to it the equipment consisted among other things of a fifteen

stamp mill and a new mill building large enough to house forty stamps. Referring to the company's water rights, the report says:

> "This water is conveyed by a four foot double lined flume from what is called the 'upper dam' to both the old and new mill. The head or pressure from tank to new mill is two hundred forty-six feet; at the old mill one hundred seventeen feet. At present the water is divided, being used at the old mill for operating the stamps and at the new mill for operating the compressor. As soon as the new mill is completed all water will be diverted and used under the high head."

(See record page 2007), and in relation to the company's future plans it is said:

> "Tests made at different times for the last five years from different portions of the property have convinced this company that they have a very large mine of medium grade ore; and that in order to make it profitable it will require a large mill; and this company has concluded to do the following: That unless negotiations are closed within the time stated this company proposes to not only immediately install the machinery in the new mill building, but to immediately commence work and extend the mill site for the installation of sixty stamps more, making a hundred stamp mill instead of forty."

(See evidence record page 2008.)

They also had before them the maps of the

underground workings, etc. Mr. Ebner at that time represented to Mr. Bradley the purpose of the new mill site on the Lotta ground where, he said, a building had been erected to contain forty stamps and where grading had been begun with a view of adding sixty additional stamps. Mr. Ebner told Mr. Bradley at this time that he was either going to sell the property or was going to raise the money to build the one hundred stamp mill, and that he would give Mr. Bradley an opportunity to buy, if after an examination he wanted it (See evidence Bradley record page 1635). An examination of the property was made, which disclosed the fact that the ore was of the same character as that contained in the Alaska Juneau mine. Mr. Bradley already owned a sufficient quantity of this character of ore, and since the plans of the Ebner Company were such that its use of the waters of Gold Creek would not interfere with the use of the waters by the Alaska Juneau Company, the location of the contemplated new mill on the Lotta claim being above the point where the latter company would divert the water if its plans were carried out, the property was not purchased. Referring to the effect of Mr. Ebner's representations in relation to the site for the one hundred stamp mill and the proposed use of the water, Mr. Bradley on pages 1637 and 1638 testified as follows:

"A" I had these negotiations with Mr.

Ebner and went to the expense of having the Ebner property examined, believing that it might be a desirable outlet for the Alaska Juneau property; and after knowing the plans, learning the plans of the Ebner Gold Mining Company, and after learning that their ore was of a similar character to ours, I saw nc advantage in purchasing the property, because we had sufficient ore of our own, and we could pick up the water after they turned it back into the creek. We had sufficient ore of our own, and I came to the conclusion for the Alaska Juneau Company that there was no need of purchasing more ore of the same character; we know just where the Ebner Company would drop the water in Gold Creek and where they would drop it and for our own needs we could pick it up below where they dropped it."

"Q" Then what did you do pursuant to that?"

"A" I went to work maturing our own plans for carrying out the general development and equipment of our property that is now under way."

There after according to the testimony of Mr. Ebner, he also had in mind other plans. One was to build a mill in the vicinity of Shady Bend, although he testified that he had not fully decided whether that was the correct place for a very large mill. Another plan was to erect a mill on the shore of the channel and some negotiations were had once with Captain Johnson looking toward the

purchase of a piece of ground on the beach for that purpose.

(See evidence Ebner, page 1122.)

Nothing, however, was done toward carrying either of these plans into execution while Mr. Ebner had charge of the property. In the year 1908 Mr. Ebner made a contract with one Underwood for the sale of his stock in the Ebner Company; the exact terms of this contract are not disclosed by the evidence. (See evidence Ebner, record page, 1087) but the testimony of Mr. Ebner was to the effect that he was not paid for this stock until about two years before the trial, which was had in June, 1914. (See evidence Ebner record page 1199). Active operations were discontinued on the property in the year 1897. (See evidence Ebner, record, page 1124.)

After the contract for the sale of Ebner's stock to Underwood had been executed, Underwood employed one H. T. Tripp to examine the property, sample it and report to him among other things in relation to a plan to operate the property on a larger scale. Tripp conceived of three distinct plans; one contemplated the erection of a mill at the point on the Lotta where Mr. Ebner had previously constructed a mill building to house forty stamps; the other contemplated the erection of a mill building at a point near where the Alaska Juneau bunk house was since constructed; and a still further plan contemplated the erection of a

mill building further down Gold Creek canyon at a point between Cape Horn and the Lotta claim, a short distance above the locality where the Mackay grade was since made. Tripp advised Mr. Underwood of each of these three plans. (See evidence Tripp, record, page 546 et seq.)

Summing up the testimony on this point, Mr. Tripp testified on page 551 as follows:

> "Q. You didn't know at this time of any decision having been reached by the company that you were working for, or anyone else in that connection, as to the point where the new mill was to be built, when you left the employ of the company on August 3, 1910?"
>
> "A. No, I don't think I did; that was about the time Bent got in and went to managing affairs, and I don't think I knew just what they were going to do."

And again on page 552 Tripp testified:

> "Q. All you know is, Mr. Tripp, that there were at least three places under consideration; one the Lotta; one where the Alaska Juneau bunk house is built, and one near where Mr. Mackay started his excavation up the creek a little way?"
>
> "A. I know they had all been reported on."

While Tripp was so employed he posted a notice under which he claimed the right to appropriate ten thousand inches of the waters of Gold Creek. This notice was posted at the old Ebner dam previously built to supply water for the op-

eration of the original ten stamp mill, on the south side of the Creek at the intake of the flume.

The original notice was written with a carpenter's pencil, and a piece of carbon paper used to make a carbon copy; the carbon copy so made, signed by H. T. Tripp, was posted on June 20, 1910. (See evidence Tripp, record page, 519, et seq.)

The point at which the notice was posted is situated on the Crown Point patented lode claim, the property of the Ebner Company. A public road leading from Juneau to Silver Bow Basin passed one hundred and fifty feet from the Ebner dam, but the brush in the neighborhood was so thick that the dam was not visible from the public road at that point; the dam could, however, be seen from one point on the public road about four or five hundred feet distant from the dam. There was no public road nearer to the dam than this road, upon this point Mr. Tripp testified on page 560, as follows:

"Q. The public road is some distance over the creek from the Ebner dam, isn't it?"

"A. Yes, sir."

"Q. There was no public road near the Ebner dam, was there?"

"A. No nearer than the public road."

"Q. That is called the Basin Road?"

"A. Yes."

"Q. That is probably one hundred feet from the dam at the nearest point?"

"A. Somewhere near that, I guess."

The witness then testified that the dam could be seen at one point on the road which was perhaps four hundred or five hundred feet from the dam. He also testified that from that distance one traveling along the road could not tell anything about the pasted notice. The testimony is:

"Q. Now, if that were posted four or five hundred feet away, and the conditions of the ground there, you don't pretend to say that anybody going up could see that Mr. Tripp had located a water right there?"

"A. I don't think they could read it at that distance."

"Q. Nor tell what kind of a piece of paper it was?"

"A. Couldn't say whether it was a carbon copy or not."

"Q. Or whether it was a carbon copy of anything could they?"

"A. No.

"Q. Or whether it was a blank piece of paper?"

"A. I don't think they could tell anything about it."

"Q. That is the only point from the public road from which is it visible, as far as you know; that is, right, isn't it?"

"A. Yes."

(See evidence Tripp, record page 562.)

This notice so posted by Mr. Tripp on June 20, 1910, was torn down during the latter part

of July, 1910. Upon that question, Mr. Tripp testified as follows, page 579 et seq.

"Q. Judge Winn asked you for the notice, didn't he?"

"A. He asked me before I left, but I couldn't find it."

"Q. Didn't know what had happened to it?"

"A. Didn't know where I put it."

"Q. Why didn't you go and get another copy off the posted notice?"

"A. Because the posted copy was torn down."

"Q. This was the only notice that was left—the copy you had, is that right?"

"A. The notice had been torn down somewhere about the last of July."

Nor was the notice recorded until the following October. When Mr. Tripp returned from a trip to the westward he found the original notice in his safe in the C. W. Young & Company's building and thereafter it was recorded. (See evidence Tripp, record page 579-580.)

Tripp left the employ of the California-Nevada Copper Company and Mr. Underwood on August 3, 1910. Up to that time no work had been done looking toward the appropriation of the waters of Gold Creek under the notice that had been posted. On page 562 Mr. Tripp testified as follows:

"Q. Now, you never did any work look-

ing toward the appropriation of water from Gold Creek under that notice up to the 3d of August, 1910, did you?"

"A. No, I didn't do any work."

And further on the same page he testified:

"Q. Up to the 3d of August, 1910, then, there had been no work done under that notice?"

"A. No."

"Q. That was the day you left?"

"A. Yes."

At the time of posting this notice both Mr. Tripp and his employer, Underwood, were familiar with the plans of the Alaska Juneau Company; on page 563 Mr. Tripp testified as follows:

"Q. At the time you were employed by Mr. Underwood both you and Mr. Underwood knew about the plans of the Alaska Juneau Company about building a mill on the beach, didn't you?"

"A. I suppose so."

"Q. The letter of October 3, 1909—under date of September 23, 1909, Mr. Ebner wrote to you as follows: 'A tunnel from the beach to the Ebner would not be justified except that the Alaska Juneau or other property in the upper basin should come under the same control; believe in that case a tunnel should be run through the ground that the Alaska Juneau has acquired for that purpose and have location for outlet and mill sites about half mile below Juneau on the beach?"

"A. That is from me to Underwood."

"Q. That is a letter you wrote to Underwood on that date, is that right?"

"A. Yes, sir."

There is no evidence that the Alaska Juneau Company or any of its officers had on August 1, 1910, or for some time thereafter, any knowledge or information in regard to the Tripp notice or the claim made by Mr. Tripp or his employers, or the Ebner Company, if any, to divert the waters of Gold Creek and convey them to a point below the site of the Alaska Juneau dam; on the contrary, both President Bradley and Superintendent Kinzie testified that they had no such knowledge. On page 1639 President Bradley in relation to this matter testified as follows:

"Q. Now, in 1910, at the time this water location was posted by Mr. Mulligan, the first of August, 1910, did you have any knowledge that Mr. Tripp had posted any notice on the Ebner dam, or elsewhere?"

"A. No."

"Q. Did you have any knowledge that the Ebner Company, or Mr. Tripp, or the California-Nevada Copper Company, or any one connected with those people, laid any claim to any part of the water of Gold Creek above your intake?"

"A. No."

"Q. I mean laid any claim to any part of the water of Gold Creek that would interfere with your taking the water at your intake?"

"A. No."

On page 1530 Superintendent Kinzie testifies as follows:

"Q. Now, on the 1st of August, 1910, did you or your company, or anyone that you had in your employ or that was connected with the Alaska Juneau Company, know that Mr. Tripp had posted a notice on the Ebner flume, or any other place, appropriating the water?"

"A. I had never heard of such notice."

"Q. When was the first time, Mr. Kinzie, that you heard of it?"

"A. Some time during the month of October, I think, of 1910, was the first I heard of the Tripp notice."

And on page 1533 the same witness testified as follows:

"Q. Had you any information in August, 1910, concerning any enlarged mill construction and mine development of the Ebner Company contemplating a large mill, other than that connected with the construction of an enlarged mill on the Lotta claim?"

"A. I had not."

Not only did the officers of the appellant company not have any knowledge of the existence of the Tripp notice, but they had no knowledge of any plans in contemplation of the appellees, or any of them, under which the waters of Gold Creek were to be carried to a point below the Alaska Juneau dam. The only plans they knew of were the plans communicated to Mr. Bradley by Mr.

Ebner, in accordance with which an enlarged mill was to be operated on the Lotta claim and the waters used in such a manner as not to interfere with their use by the appellant.

Nor could they have any knowledge on August 1, 1910, of a plan to appropriate the water to be used in a mill at Shady Bend, for such a plan had not then been formulated.

Several persons interested in the California-Nevada Copper Company arrived in Juneau along about the latter part of July, 1910, and Angus Mackay, the superintendent in charge of the work done by the company, testified on page 719 as follows:

> "Q. When you came here, it wasn't until the 3d of August, that you went upon the ground?"
>
> "A. Third of August."
>
> "Q. You and Mr. Bent and O'Boyle and Hill and Wettrick and some others, is that right?"
>
> "A. Yes, sir."

On pages 728-729 and 730 the witness testified that the three mill sites reported on by Tripp were visited by the Mackay-Bent party on August 3d, and on page 721 he testified that on August 6th it was finally decided to build the mill on the present Mackay grade. Upon this point the testimony is as follows:

> "Q. About the 6th of August you decid-

ed you would put the mill down where they made the grade, is that right?"

"A. It was fully decided about that time."

"Q. Sixth of August, 1910, isn't it?"

"A. Yes."

While Mr. Mackay testified that they had decided to build a mill at the site of the Mackay grade on August 6th, Mr. Muir who had charge of the work at that time of the trial, testified that even at that time the plans of the company in that regard were uncertain. His testimony on that subject as it occurs on page 1153 is as follows:

"Q. You never expected to build a mill, Mr. Muir, of any size at the point where this grade is immediately below that slide, did you, Mr. Muir?"

"A. Before we determined what we were going to do we are going to run the five stamp mill far enough so mineralogically, we will know what we have there."

"Q. You are first going to find out what kind of a mill you want, and then you will decide on where you are going to build it—is that right?"

"A. That is presumably the process to be followed."

"Q. But you have no intention or no idea of building a mill immediately below that slide, have you?"

"A. I couldn't say, Mr. Hellenthal, whether we have any intention or not."

The Court in the opinion refers to a letter from Tripp to Ebner as evidence of the fact that Tripp at the time of writing the letter already contemplated the construction of a mill on the Cape Horn No. 2 claim. In that letter it is stated that Tripp and Ebner had agreed that the Cape Horn No. 2 was a proper location for a tunnel to the Ebner mine. This had nothing to do with the location of a mill. The tunnel was as useful in connection with a mill built on the Lotta as with a mill built on the Cape Horn No. 2. To this latter fact the Court's attention was not directed and this no doubt accounts for the adoption of the erroneous conclusion. (See evidence Bradley, record page 1644 and evidence Kinzie, record page 1529-1530.)

Not only this, but the site of the Mackay grade was so unsuitable as a site for a mill that no one having a knowledge of mining would ever suspect that anyone would plan to erect a mill here and convey water to it. President Bradley, who all will concede, occupies a place in the foremost rank among mining engineers, testified that the Mackay grade at Shady Bend was not a safe place to build a mill and that the site on the Lotta claim on the other hand was safe and suitable; on page 1643 President Bradley testified as follows:

> "Q. Now, I want you to explain to the Court fully why it is not a safe place."
>
> "A. There was a rock slide in 1901 or 1902, came from the mountain side on the west

side of Gold Creek immediately down Gold Creek below the mill site, and the mountain side is still cracked, and the cracks are growing wider, and there is every indication that there will be another rock slide that will cover this mill site."

"Q. The point where the mountain slide is cracked and growing wider—where is that with reference to the mill site?"

"A. Back of the mill site and immediately above it."

"Q. So that if there should be another slide at the point where the cracks are widening, where would that come down?"

"A. Would come down on the mill site—by mill site, I mean the place that Mackay graded off."

"Q. You don't mean to testify that it is a mill site?"

"A. No."

"Q. What is the character of the ground on the Lotta claim with reference to its suitability as a point for the construction of a mill?"

"A. A one hundred stamp mill on the Lotta claim is a safe and suitable place."

Mr. Bradley further testified concerning the tunnel that had been started on the Cape Horn as follows, page 1644:

"Q. But the fact of that tunnel being driven there, would that be any indication to you or anyone else going up there that a mill was to be built at Cape Horn, or in that vic-

inity—by Cape Horn, I mean Shady Bend?"

"A. No."

"Q. The tunnel would be equally suitable for a mill on the Lotta claim?"

"A. It would be, yes."

Upon this same question Superintendent Kinzie testified as follows:

(See evidence Kinzie record, pages 1525, 1526, et seq.)

"Q. Is that point such a point as in your opinion, as an engineer, can be utilized as a site for a stamp mill?"

"A. I consider it a most unsuitable place; in fact, I think it would be criminal to put a mill there and allow anyone to work in it."

"Q. I wish you would explain to the Court fully the conditions above that point and surrounding that point, as a mill site."

"A. The ground, that is, the mountain just back of the mill is all cracked and broken up; there are slides occurring at intervals of about two years, in fact, there was a slide came down last winter that cut off the point of the present grade; you can see it by standing on the grade itself; there are cracks two and three and four feet wide showing in all directions in the cliff just above the present site of the mill; that is one thing that would make it extremely dangerous for a stamp mill to be placed there. Another reason why it is not a suitable place is because all that has been done is to dig out some loose earth from that old slide and throw this earth over the

bank, and there is no provision made, nor do I think it is within reason to expect any suitable foundation for stamps to be placed on the site as graded out at the present time; it is nothing more or less than a lot of loose dirt that came down in a recent slide."

"Q. Could the grading that has been done there serve any useful purpose for legitimate mining operations?"

"A. No, it could not."

Exhibits numbers 62 and 63 are photographs of rock slides that occurred in the vicinity of the Mackay grade. These exhibits are explained by the witness Kinzie on pages 1527 and 1528.

On pages 1529 and 1530 Kinzie testified that the tunnel which had been started would be as useful in connection with a mill built on the Lotta as one built on Shady Bend and fully explains his reasons for so stating. The witness also at the same place testified that he considered the mill site on the Lotta a suitable one.

The conditions on the ground, therefore, on August 1, 1910, were not such as to indicate that the Ebner Company might intend to convey water to Shady Bend, but were such as to indicate that no one would have any such intention.

On that date the situation was this: Tripp had posted a notice on the patented property of the Ebner Company, where no one, not connected with that company had a right to go, so that no one not a trespasser could gain any information

in regard to it, for the notice had not been recorded. The original of the notice so posted was locked in the safe of Mr. Tripp, and he having forgotten that he had placed it there, no one knew where it was. During the latter part of July, the posted notice was torn down. On August 1, 1910, neither the appellant nor its officers had any actual knowledge concerning the Tripp notice; on that date it could acquire no actual knowledge concerning the notice posted, because that notice no longer existed, it had been torn down. The notice was not recorded until October 25th, so that on August 1st the appellant could not be charged with constructive knowledge. The situation was such that Tripp himself could not inform Judge Winn in regard to the notice. The posted copy had been torn down; he had mislaid the original; and he had not recorded it. (See evidence Tripp record, page 579.)

Furthermore, the facts and circumstances surrounding the case on August 1, 1910, were such that even though the Tripp notice had been regularly posted and recorded, and knowledge of its contents brought home to the appellant, it could not be charged with knowledge of the fact that it was the intention of the Ebner Company to convey the waters of Gold Creek to Shady Bend or any point below the Alaska Juneau dam. Aside from the fact that the Ebner Company had at that time no intention to convey the water to Shady

Bend, it having not yet been decided to build a mill there, the notice does not state that the water was to be taken to Shady Bend, but on the contrary that it was to be applied at the Ebner mine.

On August 1, 1910, the southerly side line of the Lotta marked the lower boundary line of the Ebner property. The Parrish No. 2 had at that time no existance either in law or in fact. Its attempted location was made in 1899 and for ten years following no assessment work had been done on it. (See Finding No. 6, Ebner, etc. Co. vs. Alaska Juneau etc. Co. No. 835, record pages 123 and 124). This finding reads as follows:

> "The Court further finds that no assessment work required by law to the extent of $100 each year has been performed or caused to be performed in labor and improvements of any kind or for the benefit and use of said Parrish No. 2 claim prior to the year 1909, and that the plaintiff and its grantors failed and neglected to sufficienty represent said claim during the years prior to 1909, after its attempted location in 1899."

Under the laws of Alaska the right to resume work does not exist; failure to do the assessment work during any one year restores the ground claimed to the public domain. (See Ebner etc. Co. vs. Alaska Juneau etc. Co. 210 Fed. 599). Furthermore, no discovery had ever been made on the Par-

rish No. 2. (See finding No. 5, page 123, No. 835.) reading in part as follows:

> "That the ground claimed by the plaintiff as the Parrish No. 2 lode mining claim was located solely for the purposes of convenience; that no discovery of mineral-bearing rock in place, of any value, was ever made by the plaintiff or its grantors nor any indication or evidence of such as could or would warrant or justify one in spending time, work or money in its development or in the expectation of finding ore."

Nor was the Parrish No. 2 in the possession of the Ebner Company.

Finding of Fact No. 5, in Case No. 835—A reads as follows:

> "That the plaintiff (meaning the Ebner Gold Mining Company which was the plaintiff in that cause) is not and never has been seized, possessed or entitlted to the possession of that certain tract of ground described in paragraph three of the second clause of action set forth in the amended complaint herein and known and referred to as the Parrish No. 2 lode mining claim."

The findings in this case were made on June 12, 1911, the cause appealed to this Court where the findings were approved and the judgment affirmed.

There is no evidence in the record tending to prove that on August 1, 1910, the appellees, or any of them were in possession of the ground

embraced in the Parrish No. 2 claim. Whatever statements were contained in the brief which gave the Court the impression that this was the fact, were erroneous.

However, the situation with reference to the Parrish No. 2 is not at all important, because it is not to the Parrish No. 2 that the appellees seek to convey the waters of Gold Creek, but to the Cape Horn No. 2.

It was claimed in the appellees brief that this claim was on August 1st, in fact, the property of the Ebner Company, although located in the name of Ebner. The absence of a reply brief pointing out the testimony in relation to this matter seems to have led to the adoption of this view by the Court. This, however, is not the fact.

The Cape Horn and Eureka Lode claims were located by Ebner, Fred Micho and George Duke. (See location notices, pages 2231 and 2232.) The Cape Horn mill site was located later on by Ebner and one Lovett. (See notice record page 2221) for use in connection with the Cape Horn and not for use in connection with the properties of the Ebner Company. On page 1119 Mr. Ebner testified on this point as follows:

> "Q. But anyhow the Cape Horn Mill Site was located in connection with this Cape Horn and this Eureka Lode?"
>
> A. "Yes, sir."
>
> "Q. By you and Mr. Lovett?"

"A. Yes, sir."

"Q. Lovett was interested in them?"

"A. Lovett was my partner in any location that I made."

"Q. You were mining partners together?"

"A. We were mining partners."

On page 2254 occurs a notice of forfeiture signed by Ebner and Wilson directed to Anna Zimmerly in which it is stated that assessment work done on the Cape Horn was also intended to hold the Cape Horn mill site, showing that the mill site was attached to the lode claim by the same name.

The different interests in the lode claim and mill site were freely conveyed, sold and transferred from time to time. They were dealt with not as the property of the Ebner Company, but as the property of the locators and holders; (see deed, Duke to Zimmerly, 1-3 interest Cape Horn Lode and Eureka Lode, July 15, 1896, record page 2234; deed, August 29, 1896, Micho to Ebner, 1-3 interest Cape Horn and Eureka lode claims, record page 2237; deed July 15, 1896, Zimmerly to Ebner, 1-3 interest Cape Horn and Eureka lode claims, record page 2240; deed February 18, 1897, Ebner to Lovett, 1-3 interest Cape Horn and Eureka lode claims, record page 2244; deed February 18, 1897, Ebner to Wilson, 1-3 interest Cape Horn and Eureka lode claims, 1-6 interest in Cape Horn and Eureka mill sites, record page 2246; deed October 5, 1900, Lovett to Zimmerly, 1-3 interest Cape Horn and Eureka lode

claims; also 1-3 interest Cape Horn and Eureka mill sites, record page 2248; deed, Wilson to Ebner all grantors interest Cape Horn and Eureka lode claims, and Cape Horn and Eureka mill sites, record page 2251.)

Later on when Ebner found quartz stringers on the millsite, he located the Cape Horn No. 2 over the millsite, not in the name of the Ebner Gold Mining Company, but in his own name. Mr. Ebner was interested in the Ebner Company, but he was also interested in other properties including the Dora group adjoining the Ebner group. During all the time he was in Alaska he was a miner and prospector. He was interested not only in the vicinity of Juneau, but also at Windham Bay and he and his prospectors located claims there. (See evidence Ebner record page 1718 et seq.) If, at the time of the location of the Cape Horn No. 2, Ebner had not acquired the interests of his partners in the millsite over which the claim was laid, the law would raise a resulting trust in favor of his partners, but the Ebner Gold Mining Company had never been his partner in this location any more than the Dora Company or the company operating at Windham Bay. Nor does Ebner claim anything to the contrary. In his letter to Tripp, to which the Court refers, he speaks of the claim as his property, which he is calculating to sell to Underwood and in his testimony record page 1117, he says.

"Q. You located them for your own use;

they were not located as the property of the Ebner Company, were they?"

"A. They were located as my own property, but with the view that they were to go in as the Ebner property, when we drove that long tunnel."

"Q. They were located for your own use and as your own property, were they not?"

"A. Of course, if you look at it that way."

"Q. And before the Ebner Company had a right to them, they would have to buy you out?"

"A. Would have to buy me out? I would do the same with the Ebner Company as I did with Underwood—I said, 'Here are the claims and here are my plans, you better have all the claims so you can go ahead.' "

And when a right of way was sold to the Jualpa Company that extended in part over the property of the Ebner Company and in part over the Cape Horn, the money was divided between the Ebner Company on the one hand and Ebner and his partners on the other. (See evidence Ebner, record, page 1118.) Mr. Ebner testified that it was his intention that he and his partners should some time dispose of their interests to the company but this intention remained locked up in the breast of Ebner.

Nor would it effect the case if Ebner had been the trustee holding this property for the benefit of the company. One reading the Tripp notice would not be charged with knowledge of things not evidenced by anything appearing in the public records

and otherwise unknown to him. In construing the Tripp notice he would have a right to assume that the Ebner property was what, available information such as the public records, disclosed it to be.

This is especially true in the light of the evidence, on page 1531. Superintendent Kinzie in relation to this matter testified as follows:

> "Q. Now, on the 1st of August, 1910, had you any knowledge or information, or did you know of any property—any other mining property—further down the creek than the lower side line of the Lotta?"
>
> "A. I did not."

The notice was posted at the intake of the old flume, indicating an intention of taking the water at that point and conveying it along the southerly side of the creek as indicated in the notice. The Ebner Company had selected a mill site on the Lotta claim above appellent's intake; had there constructed a building to be used for a new and enlarged mill to take the place of the small fifteen stamp mill which had theretofore been operated. To reach this millsite the water would naturally be diverted at the point where the notice was posted and conveyed along the southerly side of the creek until the millsite was reached. The plans of the Ebner Company in this regard had been communicated to appellant; and appellant, relying upon the On that day, also, lumber was purchased for the construction of a bunk house.. (See evidence Simpson, record page 468.) This lumber was placed on

information thus conveyed to it, appropriated the water at a point below the Lotta so that its use by appellant would not interfere with its use by the Ebner Company.

Not only did the conditions on the ground indicate an intention to carry out the plans communicated to appellant but there was not the slightest evidence that these plans ever had been changed.

It is said by the Court in the opinion that the posting of the notice indicated an intention not to use the water at the old stamp mill, since the water had already been used at that mill. No fault can be found with this conclusion, except that the notice might indicate an intention to enlarge an existing water right or to renew a water right lost by abandonment. But, however, correct the conclusion of the Court is in this regard, it does not effect the force of the contention made, which because of a failure to file a reply brief, was not pointed out as clearly as it otherwise would have been. It is not contended that the posting of the notice at the intake to the old flume indicated an intention to apply the water to the old fifteen stamp mill, but at the mill site on the Lotta in connection with the operation of an enlarged mill, the building for which had already been constructed at least in part, although the stamps had as yet not been installed. The water had been applied at the fifteen stamp mill, but water was necessary to operate the new mill on the Lotta and this required an additional

appropriation, because this new mill had not yet been completed.

At this point it must be observed that Tripp and his employer, as has already been pointed out, knew all about the plans of the appellant, and as a mining engineer Tripp knew how essential it was to the successful consummation of these plans that appellant should be able to appropriate and apply the water of Gold Creek, for from no other source could a supply of fresh water be secured. He also knew that the indications on the ground evidenced an intention on the part of the Ebner Company to use the water sought to be appropriated at the new mill site on the Lotta. Clearly if it was his intention to use the water below that point, he should have so stated in his notice in unmistakable terms, especially so since the location of Shady Bend was so unsuitable as a site for a mill that no one would be warranted in suspecting that anyone ever contemplated the erection of a mill there.

Under these circumstances the Alaska Juneau Company posted its notices and initiated its right. On the same day that the notice was posted, work was commenced, looking toward the diversion of the waters from the creek and their application to the beneficial uses designed.

The canyon of Gold Creek in the vicinity where the notice was posted was very rugged and precipitous and wherever level spots occurred they were covered with a very heavy growth of alder brush.

The conditions were such that men could not go back and forth, either to the proposed dam site or the flume route in that vicinity until trails had been made and steps cut in the rocky cliffs, nor could materials, necessary for the construction of the dam be brought there, until this preliminary work had been done. In addition to this, there was no place to house the men until a bunk house had been built. (See evidence Kinzie, record, page 183 et seq.) (See evidence Harri, record page 393.)

One O. M. Harri was placed in charge of this work and authorized to employ additional men as fast as he could use them. (See evidence Kinzie, record page 187). On August 1, 1910, the same day on which the notice was posted, Harri went upon the ground and commenced the preliminary work of building trails, making arrangements for the construction of a bunk house and doing such other things as were necessary before actual work on the construction of the dam and flume could be prosecuted. (See evidence Harri, record page 390 et seq.)

On August 2d, Harri commenced placing additional men at work and continued doing so from that time on, pressing the work forward as speedily as possible. (See evidence Harri, record page 393, et seq; also evidence Kinzie, record page 189). the ground on the fourth, fifth, and sixth, it having been taken from the James saw mill on Douglas Island, across the channel to Juneau and thence

by wagon up the creek. (See evidence Lynn, record page 424.) As corroborating the evidence of Harri and Superintendent Kinzie on this point, Russell Casey testified on page 430 that he commenced brushing out the road leading to the dam site on August 2d, and on page 432 he testified that two other men, one named Sandy Hilton and the other named Cash Cole assisted after he had been there a day or so. The witness Cash Cole testified on page 461 that he commenced work in the early part of August.

The witness Dempsey testified that in the early part of August, about the sixth, he commenced work building a small bunk house and that while he was working there, others built a small blacksmith shop. (See evidence Dempsey, record page 464 et seq.)

The witness Hilton testified that he commenced work on the 3d of August. (See page 437.)

From that time on the work was carried forward continuously and without cessation or delay until the water was applied to use on November 17th. As many as fifty or sixty men were employed one time when the work had so far progressed that the employment of that number of men was practical. (See evidence Kinzie, record page 189 et seq.) During the entire progress of the work as many men were employed as could be employed to advantage. Touching this question Superintendent Kinzie testified:

"We worked every man we could advantageously work at all times from the time the water was first appropriated to the time the water was put to use."

(See evidence Kinzie record page 191.)

The preliminary work was completed by the first of September and at that time work on the flume was commenced. The witness Kinzie testified that this work was commenced in the early part of September. He was then interrogated in relation to the continuous character of the work previously done. Upon this subject he testified as follows:

"Q. Prior to this time had there been any intermission in the work?"

"A. There was no intermission in the work."

"Q. Work had been carried on continuously in the vicinity of the point of diversion, in the way of preliminary work?"

"A. Work had been carried on from the point where the water was to be diverted to a point just below Snow Slide Gulch."

"Q. This work was all in the vicinity of the point of diversion?"

"A. It was all in the immediate vicinity of the point of diversion, yes, sir."

"Q. And that had been carried on daily and continuously from the first of August up to the time we now speak of?"

"A. Continuously."

The same witness then testified in detail how

the work was continued from day to day until the water was applied to use on November 17th. (See evidence Kinzie, record page 193 et seq.) Photographs showing the progress of the work were offered in evidence and explained by the witness, and also photographs showing the damage done to the flume and dam of the appellant by those in the employ of the appellees, who resorted to the use of dynamite and large boulders, for that purpose, seeking by these methods to delay and retard the work.

The continuous character of the work is best evidenced by the expenditures made. In August, 1910, $368.02 was expended; in September of the same year $346.98 was expended. During this same month tunnels were driven in connection with the establishment of a flume grade, but this work was done by contract and does not appear in this total. During the month of October of the same year $3,328.43 was expended and in the following month, the month of November, this being the month when the water was first applied to use at the Snow Slide Gulch compressor, $4,996.93 was expended.

The first use made of the water on November 17th was in connection with the driving of a compressor plant situated in the vicinity of Snow Slide Gulch and from that day forward the work looking toward the application to use of the water on the Gastineau Channel mill site was carried on continuously until the water was there actually applied.

Upon that question the witness Kinzie testified: (See evidence Kinzie, record page 205 et seq.)

"Q. Now, after putting the water to use at the Snow Slide Gulch compressor, what, if anything, did you do from then on toward completing the flume line—the flume to the mill site on the shore of Gastineau Channel?"

"A. The work of grading and building the flume line and also the necessary tunnels was carried on continuously from that time to the time that the water was put to use on the mill site on Gastineau Channel, which is the same mill site now occupied by the Alaska Juneau Company's mill."

"Q. When was the water put to use on those mill sites?"

"A. That was in the spring of 1913."

"Q. To what use was it then applied?"

"A. It was first applied to the hydraulicing of the dirt from the hillside, for the foundation of the mill."

"Q. To what extent was the water applied at that time—the entire capacity of the flume or less?"

"A. Practically the entire capacity of the flume was used."

"Q. For that purpose at that time?"

"A. It was."

"Q. To what extent, if at all, was the water used on the mill site since?"

"A. The water has been used continuously since that time."

"Q. On the mill site?"

"A. Yes."

The total amount of expenditures in connection with the appropriation of the water and its application to the Snow Slide Gulch compressor and to the mining operations on the mill site amounted to $98,826.14. (See evidence Kinzie, record page 503 et seq.) During this period the total amount expended by the company in connection with its operations exceeded $1,000,000.00 (See evidence Kinzie, record page 212.)

On the 25th day of August, 1910, a suit was commenced by the Ebner Gold Mining Company, appelle, aginst appellant. In that suit a complaint was filed, alleging that Mulligan had posted a notice on the Lotta claim on or about the 27th day of July, 1910; that the appellee was the owner of the Lotta and Parrish Nos. 1 and 2 claims, and that ever since the 27th day of July, 1910, appellant had continuously trespassed upon the property of the appellee.

The language of the complaint is, that the defendants in that suit

> "have been since said time (meaning the date of the posting of the Mulligan notice) continuously, wilfully and maliciously trespassing upon property of the plaintiff company."

And further on in the same document, it is stated:

> "And have been removing the timber therefrom and clearing up what appears to be a right of way for flume, ditch or pipe-line to

convey water from said Gold Creek from the point of posting said notice above referred to, in and over and upon the said last mentioned lode claims, and off of and away from the premises and mining claims of this plaintiff company."

(See record page 1966.)

And the eighth paragraph contained in said complaint, reads as follows:

"That said defendants are constantly and daily performing and doing the acts and things therein complained of, and have been so doing said acts and things since on or about 27th day of July A. D., 1910, and are threatening to carry out their said purpose and accomplish the things complained of herein, and will do so unless restrained immediately by this Honorable Court."

(See record page 1968.)

In the prayer of the complaint the Court is asked, among other things, to enjoin the appellant from diverting the waters of Gold Creek. A preliminary injunction was asked for and after a hearing had, this application was denied by the Court.

Commencing on or about the 6th of August, the California-Nevada Copper Company commenced doing preliminary work, looking toward the construction of a flume from the Ebner dam to Shady Bend along the north side of the creek and after the preliminary work was done, work in connection with actual flume construction work was carried on more or less spasmotically until the fall of

1913. The flume was completed to the mill site in the month of December of the year 1910, except that a nine-inch board was placed thereon two years later, the penstock was put in and the flume connected with it in 1911. (See evidence Mackay, record page 1191.) No attempt was made to apply the water to use until the water had not only been applied by appellant at Snow Slide Gulch, but also on the mill site on Gastineau Channel.

The Trial Court made a finding which reads as follows:

> "That not until after the defendant had followed up its first step, namely, posting of notice, by the actual physical work at the point where its notice was posted, and after actual diversion of the water at such point, did the plaintiff do anything that would give notice to to the defendant of any claim that the plaintiff intended to make to the water of Gold Creek, or do anything looking to the appropriation of water, or indicating any intention or desire to appropriate the waters of Gold Creek."

It is difficult to say upon what theory of the facts the Trial Court based this finding.

The evidence is undisputed, that the work was commenced by appellant on August 1st, and carried on continuously thereafter as above indicated.

The complaint filed in this suit on August 25th shows not only that the appellee knew that the work had been carried on continuously on the ground from day to day, but also shows that the

work was of such a character as to clearly indicate its purpose for it is said in this complaint that the appellant was "clearing up what appears to be a right of way for flume, ditch or pipe line to convey water from said Gold Creek."

And also

> "that said defendants are constantly and daily performing and doing the acts and things therein complained of, and have been doing such acts and things since on or about the 27th day of July, 1910."

That the work had been carried on daily and continuously, therefore, and that it was of such a character as to apprise the appellee of its object and purpose, is evidenced by the undisputed evidence of the witnesses; and that the appellee knew that the work was being so carried on, and knew the purposes for which it was being conducted is evidenced by the solemn declaration of the appellee itself, made in a pleading filed by it in a court of justice.

The Trial Court must have received a wrong impression in regard to the facts bearing upon this point, or the finding insofar as it is above quoted, must have been due to some mistake. Such a finding, in any event, could be set aside by the appellate court but under the laws of Alaska there can be no doubt as to the Court's right to take this action.

Section 1204 as herein referred to, is set out

at length on page 24 of the opening brief, and it is therein provided with reference to findings of fact,

> "and such findings of fact shall be subject to review by the appellate tribunal, and may be amended to conform to the evidence."

While as will hereinafter be pointed out, this finding is, in any event, immaterial under the facts in the case, there can be no doubt of its erroneous character or of the Court's power to correct it.

This Court sustained the finding on the theory that the appellant having committed a wilful trespass on the Lotta claim, the posting of its notice and the work done by it, could not form the basis of a right.

Because of our failure to file a reply brief pointing out the facts in relation to this matter, the Court was led to adopt erroneous views of the evidence.

While the Oregon claim overlapped the Lotta claim, the evidence does not show that the appellant ever claimed any portion of the ground embraced within the Lotta.

True there was some dispute as to the location of the boundaries of the Lotta, but the Lotta claim was always conceded to be the property of the appellee. (See evidence Kinzie, record page 1554, also record page 256.) The Oregon claim as located, overlapped the Lotta, but this is a usual thing in a mining country. Locations are frequently made so as to overlap patented claims. Sometimes this is nec-

essary in order to make the end lines parallel but it more often occurs where the exact boundary of the patented claim is uncertain. In such cases, the location is so made, in order to avoid leaving a fraction between the claim located and the adjoining patented claim. So also in locating fractions, claims are usually run out full length.

It has already been pointed out in detail how the Mulligan notice happened to be posted on the Lotta claim and it is unnecessary to repeat what has been said in relation thereto.

The Court seems to have received the impression that a flume grade had been projected over a portion of the Lotta and Parrish No. 2 claims and that because of an action of ejectment which resulted in ejecting the appellant, the flume was afterward built on another grade. This is not the fact.

The Alaska Juneau dam was first built at the identical spot now occupied by it and the flume was originally constructed on the same grade that it now occupies. (See evidence Kinzie, record page 1521.)

Witness Kinzie, on the page above referred to, testified that on October 3d, the present Alaska Juneau dam was built below the brushed out line of the Lotta. This brushed out line was the southerly line of the Lotta as claimed by the appellee and as subsequently determined by the Court. The following is a portion of the testimony of this witness:

"Q. Was there ever any dam put in at any other place further up stream?"

"A. No, no dam at any other place except the position it was put in that day."

"Q. Where was the flume and headgate put with reference to the brushed out line of the Lotta?"

"A. That was below the brushed out line of the Lotta."

"Q. Did you ever put any flume or headgate above that place?"

"A. No; that was the only flume and headgate ever put in."

"Q. Where was the dam put in on October 3d with reference to the point where the dam now is?"

"A. At the same place."

"Q. Where was the intake or flume and headgate put in on the night of October 3d with reference to the place where the flume and headgate now are?"

"A. In exactly the same place."

"Q. Now, prior to the time that Judge Cushman's decision was rendered in the Basin case, what part of the dam extended over the line or on the Lotta claim?"

"A. On the left-hand side of the Creek there was an abutment or filling."

THE COURT: Right hand side of the creek going up or going down?"

"A. It would be the right hand side going down, the left hand side going up; there was a filling in front of the portion of the dam, and a portion of this filling was above the

lower side of the Lotta as determined by Judge Cushman."

"Q. The dam itself, the timber structure of the dam, where was that with reference to the lower side line of the Lotta prior to the decision?"

"A. The timber was always below the lower side line of the Lotta."

"Q. Now, after the decision by Judge Cushman what change, if any, was made in the dam?"

"A. The crib structure has been built on the left hand side of the creek going up, and this is constructed by cutting hitches into the rock on either side, and logs are held in place in these hitches by vertical logs placed on the lower side; the filling of the dam was then removed and then allowed to be carried down stream by the water, and filled in against the present left wing of the dam."

"Q. After you made that change, was there any of the dam on the Lotta claim?"

"A. No, no portion at all."

It is true that the Mulligan notice was posted on the Lotta but no work of any character was done on the Lotta claim. A tunnel was commenced in the latter part of August about ten feet above the present grade, but this tunnel was not on the Lotta claim. It was on ground covered by the Parrish No. 2 and Oregon claims.

On the 12th of September Surveyor Lindsay commenced work making the flume grade survey

and found that this tunnel was started too high up. He reported this fact to the superintendent and a few days later a new tunnel was commenced on the present grade.

All this was done long prior to the time that the judgment was render in the case referred to by the Court in its opinion between these same parties, adjudging the appellee to be the owner of the Lotta claim, defined by fixed boundaries delineated in the judgment and ejecting the appellant therefrom.

There was nothing for the judgment to operate upon, except the abutment to the dam referred to in the testimony of the witness above quoted. The Court seems to have gotten the impression that a flume grade was established and changed because of the judgment in that case. This is an error. When that judgment was rendered, the water had already been applied to use and the flume which was first built and was then in use is the same flume that is now being used.

THE TRIPP NOTICE

According to the facts, as they must be conceded to exist, appellant was the first to commence work looking toward the appropriation of the waters of Gold Creek and the first to apply these waters to a beneficial use; but it was urged that since the Tripp notice was posted, before appellant commenced work, the rights of the appellee

related back to the time of the posting of the Tripp notice and antedated for that reason the rights of the appellant.

No reply brief having been filed, pointing out the peculiar facts in this case, which prevented the application of the doctrine of relation back to the Tripp notice, the Court adopted the view of the appellee in this regard.

The reasons why the rights of the appellee cannot by relation date from the time of the posting of the Tripp notice will be separately considered.

I.

THE TRIPP NOTICE WAS NOT THE NOTICE OF APPELLEE

This proposition was discussed in the opening brief, where it was pointed out that Tripp was an employee of Underwood and the California-Nevada Copper Company and not of the Ebner Gold Mining Company. It was, however, urged that since the California-Nevada Copper Company was a stockholder in the Ebner Gold Mining Company, its employee, Tripp, was authorized to act for the Ebner Company in the matter of locating water rights, and the Court adopted the view that a large stockholder could ,because of his ownership of stock, represent the corporation in this regard, citing Moore vs. Abilene National Bank, 159 Fed. 391, where it was held that the holder of the ma-

jority of stock of a corporation has the power, by electing biddable directors and by the vote of its stock, to do everything that the corporation can do, and that by reason of this he was the actual, if not the technical trustee for the minority holders of stock. That the majority stock holder of a corporation can, by voting his stock and electing biddable directors, control the action of the corporation cannot be disputed, and that he owes a duty to the minority stockholders because of this is equally true. But the mere ownership of stock does not make him the agent of the corporation. Each partner is the agent of the firm; in fact agency is the test by which it is determined whether an association of persons is, or is not a partnership. But a mere stockholder in a corporation, however large his holdings, cannot direct the business affairs of the corporation except by voting his stock at stockholders' meetings and electing directors who will do his bidding.

Again, the notice was signed by Tripp not as the agent or representative of some one else, but in his own name, It did not purport to be the act of the Ebner Company or the act of the California-Nevada Copper Company, or the act of Underwood. It purported to be upon its face nothing but the act of Tripp.

As between Tripp and his principal, if he were an agent this might not be important, but as between the principal and third parties, who are

not known to have had notice of the relation, quite a different matter presents itself.

Again, even though we assume that the California-Nevada Copper Company or Underwood, by virtue of ownership of stock in the Ebner Company, could act as the agent of that company, Tripp, who was at most the agent of Underwood or the Copper Company, could not and would not have the authority possessed by his employers in this regard, for it is a maxim of the law of agency that delegated authority cannot be delegated.

An agent of an agent is not the agent of the principal. If the California-Nevada Copper Company or Underwood were the agent of the Ebner Company, he or it might exercise the authority so possessed, but neither could delegate this authority to another.

II.

THE TRIPP NOTICE WAS POSTED ON THE PATENTED PROPERTY OF THE EBNER COMPANY SO THAT ITS CONTENTS COULD NOT BE ASCERTAINED BY ANY ONE WITHOUT BECOMING A TRESPASSER

As has been pointed out, the Tripp notice was posted on the Crown Point lode, the patented property of the Ebner Company, where one not connected with that company had no right to go.

In this connection it is contended that the mere posting of a notice in such a place that no

one can ascertain its contents without becoming a trespasser cannot serve as the basis for a right.

In this case the notice was not only posted on the private property of the Ebner Company but at a later date trespass notices were found on the property of this company warning others to keep off from it, and it is also shown that this company did not hesitate to resort to the use of dynamite and other violent methods in driving off persons whom they regarded as trespassers.

Furthermore, it is contended that appellee could acquire no right to the waters of Gold Creek because the Mulligan notice was by inadvertence posted on the Lotta claim. In other words, it is urged that the appellant should be condemned for inadvertently trespassing upon the Lotta. How then, can it be urged that the appellant shall also be condemned for not wilfully trespassing upon the Crown Point?

III

THE TRIPP NOTICE WAS TORN DOWN DURING THE LATTER PART OF JULY, 1910, AND WAS NOT REPOSTED. THE APPELLANT WITHOUT KNOWING THAT IT HAD EVER EXISTED, COMMENCED TAKING STEPS TOWARD THE APPROPRIATION OF THE WATERS OF GOLD CREEK ON AUGUST FIRST, 1910

Notice must be either actual or constructive.

The Trial Court found that the miners' rules which provided for constructive notice in certain cases had fallen into dispute and were no longer in effect. There was not then in force in the Territory any law providing for constructive notice on August 1, 1910.

Before there can be constructive notice, there must be a law providing how such notice shall be given and that law must be complied with.

During the latter part of July, 1910, the Tripp notice was torn down. On the first of August following appellant posted its notice and commenced work.

It had no knowledge whatsoever concerning the Tripp notice and it was impossible for it to procure such knowledge for the notice had been torn down and was no longer in existence. Not only was the notice torn down but it was not recorder until the following October, so that at that time the records disclosed nothing with reference to its existence. Surely the law would not impute to the plaintiff knowledge of information which it could not by any possibility acquire.

In the absence of miners' rules or statutes providing for constructive notice by recording water notices, such notices can for obvious reasons serve no purpose unless kept posted on the ground, at least as regards persons having no actual knowledge of their existence. This precise question was before the Supreme Court of California in the

case of Kimball vs. Gearhart, 12 Cal. page 32. The tenth instruction given to the jury in this case at the request of the defendants and which was approved by the Court, provides as follows:

> "Even if the plaintiffs had located and claimed the waters in dispute, in the year 1854, and prior to the appropriation of the same by the defendants yet, if after making such location and claims, *plaintiffs failed and neglected to renew or keep in existence such notice*, or such other evidence of their location and claim, as would have put a reasonable and prudent man, wishing to appropriate the water, on inquiry, and in the absence of the notices or other evidences of said location or claim, the defendants located and appropriated said water in good faith for mining purposes, they must find for the defendants."

The reason why the law requires a water notice to be kept posted or other evidence of location to be kept in existence in the absence of a recording statute is will illustrated by the facts in this case.

When the appellant went on the ground on August 1, 1910, to appropriate the water, the posted notice had been torn down so that there was no posted notice. Nor were there any other evidences on the ground indicating an intention of making a new appropriation of water. No work of any kind was being carried on. The mill buildings, flume, dam and everything else whatsoever about the Ebner mine were as they had been for years.

An investigation of the public records disclosed nothing for the notice had not been recorded. Nowhere was there the slightest evidence that the Ebner Company, Tripp, or any one else, intended to make a new appropriation of the waters of Gold Creek or make any use of these waters that would in any wise interfere with their appropriation by appellant.

The plans of the Ebner Company had been communicated to appellant by Mr. Ebner himself. Under these plans that company expected to use the water on the Lotta claim and this use of the water would not interfere with its appropriation by appellant.

Under these circumstances, appellant posted its notice and commenced work.

Not only did appellant at this time have no knowledge that the Tripp notice had ever existed but the knowledge of Tripp and the Ebner Company in this regard did not go much farther than the knowledge of appellant.

Tripp knew that he had posted the notice and this fact he communicated to the attorney for the Ebner Company, Judge Winn, but when Judge Winn asked him for a copy of the notice he was unable to supply it.

The posted notice had been torn down and the original which he should have had recorded was mislaid so that he could not find it. During all this time Tripp and his employer knew the plans

of appellant and as mining engineers they knew how vitally important it was that appellant should have the right to appropriate the waters of Gold Creek in connection with the consummation of these plans, yet appellant was not given the slightest intimation concerning the fact that the Tripp notice had ever existed.

On August 25th a suit was brought by the Ebner Company against the appellant. The Ebner Company laid claim to a mining claim called the "Parrish No. 2," and appellant claimed this same ground under a location called the "Oregon." Appellant was working on this ground and the Mulligan notice had been posted on the Lotta, an adjoining patented claim. The work being done by the appellant was in connection with the diversion and the appropriation of the water. Hence, suit was brought to enjoin the appellant from trespassing upon the Lotta and Parrish claims and from diverting the water of Gold Creek. Yet in this complaint which covers many pages, the Tripp notice was never mentioned. Not one word is said about it. The reason for this is obvious. While the Ebner Company may have known that a Tripp notice had been posted, it knew nothing about its contents for the notice which Tripp had mislaid had not yet been found.

Not only did this complaint make no mention of the Tripp notice, but the claim to the water was based first upon the right of the Ebner Company

as a riparian owner by reason of its ownership of the Parrish No. 2 claim, and secondly, upon the fact that the water had been "owned, possessed, appropriated and used by the Ebner Company and its predecessors in interest and applied to use in the operation, mining, opening up and development of said mining claims."

Not one word was said in regard to any plan under which the waters of Gold Creek were to be diverted and applied to use at Shady Bend or under which any new appropriation of the water was to be affected.

There was no reason why appellant should abandon its plans because of the first claim made, for aside from the fact that the doctrine of riparian rights has no application in Alaska, no essessment work had been done on the Parrish claim for many years. (See finding No. 6, record page 123) nor had the locators of the Parrish ever made a discovery. (See finding No. 5, record page 123.)

Nor, was there any reason why the fact that the Ebner Company had appropriated and used the water for many years should deter the appellant because such application and use did not in any wise interfere with the appropriation of the water by appellant, since it was used and turned back into the creek at a point above appellant's dam.

Appellant's work was accordingly pressed forward and appellant continued to spend its money

without any knowledge concerning the Tripp notice or any claim to the waters of Gold Creek on the part of the Ebner Company, that would interfere with their appropriation by it.

In October, Tripp returned from a trip to the westward. Thereupon he found in his safe in the C. W. Young & Company's building the notice that he had previously mislaid. This notice was on October 25th recorded and then for the first time appellant became aware of the fact that such a notice had ever existed.

(See evidence Kinzie, record page 1530.)

At this time appellant had not only located the water and commenced work, but had spent thousands of dollars in the prosecution of the work, having already carried the work forward to such an extent that on the 17th of November following the water was applied to use.

The contention made by appellee is simply this: that one who, in good faith and without knowledge of the fact that a water notice has even been posted by another, posts a notice and commences work looking toward the appropriation of water and presses such work forward with diligence, expending large sums of money in that connection, can be deprived of his water right by another upon a showing that such other had posted a notice which was not recorded and which was torn down so that it was not posted at the time he posted his notice and commenced work, making it impossible

for him to inform himself of the fact that such notice had ever existed; and the further showing that the original of the notice, a copy of which was posted and torn down, was mislaid, so that the person posting it was unable to supply a copy of it until months later when the original was found, and placed on record, at a time when the appropriator whose rights are subordinated to those of the poster of the notice had spent thousands of dollars without any knowledge or possible means of acquiring knowledge that such notice had ever been posted. The statement of this contention is sufficient to refute it.

Cleary, the Supreme Court of California announced the true rule in Kimball vs. Gerhart. Yet, if this contention is unsound, the decree in this case must be reversed for the contention states the exact facts as they exist in this case.

This point was not considered in rendering the decision, no reference being made to it in the opinion, showing that it was not called to the attention of the Court with sufficient clearness, due to a failure to file a reply brief. It is urged, therefore, that for this reason, if for none other, a rehearing be granted, in order that this matter, which so vitally affects the rights of appellant, may be fully presented to the court for their consideration.

This point is not only of vital importance to appellant, but is of equal importance to all others engaged in the mining business; for if one who ap-

propriates water in good faith cannot rely on the evidences of the public character of the water and of his right to appropriate it, as they exist at the time he initiates his right, the law relating to the right of appropriation loses its force and the right itself becomes valueless.

IV

THERE WAS NOTHING IN THE TRIPP NOTICE TO INDICATE ANY INTENTION TO CONVEY THE WATER TO SHADY BEND

The Trial Court found that it was a custom to post notices in connection with the appropriation of water. This is as far as the findings of the Trial Court went in this regard. Neither the findings of the Court nor the evidence shed any light upon the subject of what such notices must contain.

Clearly, every writing denominated a water notice could not be held sufficient as such, and since there is no finding upon the question of what kind of a notice the custom which the Court found to exist, required, there is no way of telling whether the Tripp notice complied with this cuscustom.

In California prior to the adoption of definite statutes and rules upon the subject, such actions, indications and evidences of appropriation were required as the nature of the case and the

face of the country would admit of, and as were under the circumstances and at the time practicable.

Notice had to be given, or the doctrine of relation back could not be invoked, but

> "the notice might be given by posting a written notice, blazing trees, or placing other unmistakable evidences upon the ground."
>
> *Kimball vs. Gearhart*, 12 Cal. 28.

This same doctrine was clearly announced by Judge Ross in the case of Osgood vs. Water & Mining Co., 56 Cal. 571-580.

In that case a water appropriator had posted a notice which was more or less indefinite, but in addition to posting the notice he had clearly marked and defined upon the ground the line of his proposed ditch. This had been done by means of stakes and the blazing of trees. Some work also had been done upon the ditch along its course when the rights of a subsequent claimant attached.

It was held that under the circumstances sufficient notice had been given. Judge Ross, speaking for the Court, said:

> "Leaving out of consideration the notice of 1860, by that of 1867, the plaintiff or any other inquirer would have seen that Kirk and Bishop claimed to be entitled to the waters of Echo Lake, for mining, manufacturing, agricultural, and other purposes, and that they intended to dam the stream, and take the water for the purposes mentioned,

> in a flume, ditch, or canal, or by natural channels wherever found suitable. Looking further, he would have seen the proposed ditch staked and marked upon the ground, as finally completed, and through which the water was, infact, finally diverted."

Under these decisions notice might be given by posting a written notice or by blazing trees, or placing other evidences on the ground, or a notice might be posted supplemented by other evidences on the ground. In any event, however, the posted notice was construed in the light of the other evidences on the ground.

In Alaska it is a custom, under the Court's findings, to post a written notice, but since there is no finding upon the subject of what such notice must contain, any notice, which in connection with the evidences on the ground would indicate the appropriator's intention, would undoubtedly be held sufficient. So that after all, the law in Alaska and the law in California prior to the adoption of statutes and rules upon the subject are in all respects the same, except that in California written notice need not be given to evidence the appropriator's intention, while in Alaska a written notice must be given as one of the evidences of such intention. A written notice if posted would have the same effect in California that it would have in Alaska. In either jurisdiction an otherwise deficient notice would be aided

by the evidences on the ground and if indefinite it would be explained by the same evidences. In any event, the evidences on the ground form a part of the notice and it must be read in the light of these evidences in order to asecrtain the intention of the appropriator.

The Tripp notice named no definite place of use other than the Ebner mine. The Ebner mine consisted of the underground workings, buildings, and other appliances used for mining purposes situated on the Ebner mining property.

On August 1, 1910, this property did not, at least as far as any one reading the Tripp notice could determine from available evidence, extend down stream beyond the southerly boundary of the Lotta claim, immediately below which appellant's dam and intake are situated. The underground workings were situated at the upper end of the group. Here also was situated a fifteen stamp mill which had been used for a number of years. At the lower end of the group a building had been constructed to house forty stamps and other mining machinery but no stamps or other machinery had been installed, except a compressor plant which had been placed in a room partitioned off for that purpose.

Mr. Ebner, the president of the Ebner Company, had told Mr. Bradley, the president of the appellant company, that it was his intention to open up the Ebner property on a larger scale, by

enlarging this building that had been constructed to house forty stamps so that it would house one hundred stamps, and then install therein one hundred stamps and supply the necessary power by diverting the waters of Gold Creek and conveying them to this mill.

A flume had been constructed from the Ebner dam to the fifteen stamp mill and the water had there been applied to use.

The Tripp notice was posted at the intake of this old flume, which was so situated that if enlarged and extended along the hill side until a point above the new mill on the Lotta was reached, it would serve as a portion of the flume by which water could be conveyed to, and applied to use, at the last mentioned point. There were no evidences on the ground to indicate an intention to convey the water to Shady Bend, or to make any new appropriation of water for use at any point except the site of the proposed new mill on the Lotta claim. No work of any kind was being done on the property.

The physical conditions at Shady Bend were such that the place was entirely unsuitable and unsafe as a site for a mill, so that no one would suspicion that any one would ever intend to build a mill there; nor had the appellees formed any intention of building a mill there on August 1, 1910.

Tripp had reported on three mill sites to his

employer, one of these was in the vicinity of Shady Bend, but his employer did not decide to build a mill at Shady Bend until the 6th day of August, and it must be that this decision was afterwards reconsidered for at the time of the trial the whole matter was still a matter of uncertainty.

Not knowing that an intention would ever be formed to build a mill at Shady Bend, Tripp could of course not make an appropriation of water for use at that point and was not in position to make any statement in his notice in regard to Shady Bend; but if Tripp could not do this, how could the appellant be charged with knowledge of the fact that any one would ever intend to build a mill at Shady Bend? Surely appellant could not have knowledge on August 1st of an intention that did not exist at that time, and the law would not presume that appellant had knowledge of that which was not known.

It may here be observed that the appellee never had any more than an intention to build a mill at Shady Bend. While some grading was done, no mill was ever built and in the light of the testimony of Mr. Bradley and Mr. Kinzie, in relation to the physical conditions at Shady Bend, it is safe to predict that no mill will ever be built there.

In the light of the evidence of Superintendent Kinzie that the grading done was all in loose

dirt and could serve no useful purpose in connection with the construction of a stamp mill it may well be doubted that any one ever intended to build a mill there. By working in loose dirt a large showing can be made for very little money. Such a showing is a valuable asset when it comes to raising money and the evidence leaves no doubt but what the Ebner Company, or more properly speaking, the California-Nevada Copper Company, was at this time quite as actively engaged in raising money as it was in building mills. When the stock of the Ebner Company was transferred to the Copper Company, it became subject to a two and one-half million dollar mortgage given by this company to secure its bonds. (See mortgage, record page 2010.) The load of debt thus thrust upon it was too heavy for the Ebner Company to bear. The bondholders seeing an opportunity of realizing something on their bonds, commenced foreclosure proceedings and the whole enterprise so auspiciously begun under a clear sky, collapsed under the weight of the juggernaut to which it was sacrificed, the Copper Company mortgage, and was reduced to a state of innocuous desuetude.

The Tripp notice, therefore, taken in connection with the evidences on the ground would indicate to a subsequent appropriator that it was the intention of Tripp, if he acted for the Ebner Company, to take out the water at the old Ebner dam, enlarge the old Ebner flume and extend it

until a point was reached above the mill building on the Lotta and make a new appropriation of water for use in connection with the operation of an enlarged mill to be there installed. It would indicate this and nothing else.

Especially is this true in the light of the fact that Tripp knew the plans of appellant and knowing these plans he would, if he had intended to interfere with them, have clearly indicated in some manner his intention so to do, and in the light of the further fact that the plans of the Ebner Company to build an enlarged mill on the Lotta above appellant's intake, had been communicated to it, so that it would be entitled to some notice of a change in these plans.

And here it may be observed that not only were these plans of the Ebner Company communicated to appellant, but they were a matter of general public knowledge. This is made evident by an inspection of the sketch map taken from a publication of the government; on this map is platted the fifteen stamp mill which is designated as the Ebner mill and also the new mill building on the Lotta which is designated the "new mill." (See record, page 1533 and map page 2152.)

The giving of a notice of an intended appropriation of water serves two purposes:

In the first place, it defines the right claimed and notifies others thereof so that the right so claimed will not be invaded.

In the second place, it limits the right claimed, giving others notice of its extent, so that such others may be able to appropriate the water below the intended place of use where it has been turned back into the stream—this in order that the best use possible may be made of the water, the aim not only of the miners and early settlers, but of all the rules, customs, regulations and statutes upon the subject.

Kinney vs. Smith, 21 Cal. 374.

The plaintiffs in this case built a dam in Clear Creek in the year 1853. They were the owners of a placer mining claim situated below the dam and between it and a ravine called "Slate Gulch." Slate Gulch was a gulch that emptied into Clear Creek. The plaintiffs built a ditch from their dam along the bank of the creek until Slate Gulch was reached. The ditch was so constructed that the waters could be diverted from the creek conducted through it to Slate Gulch and emptied into Slate Gulch, through which they would flow back into the creek.

The object of the diversion of the water was to enable the plaintiffs to work these placer mines in the bed of the creek. A notice was posted at the entrance setting forth this purpose. The principal purpose was to rid the bed of the creek of water, but it was shown that some of the water was also taken from the ditch and used in sluicing the ground.

The defendants built a dam a considerable distance above the plaintiffs' dam and diverted and appropriated the water for mining purposes. After this appropriation by the defendant the plaintiffs extended their ditch across Slate Gulch and to a point several miles below Slate Gulch where the water was applied for agricultural purposes.

A suit was brought to enjoin the defendants from diverting the water, on the ground that such diversion diminished the flow of water in the creek and that the portion which was returned to the stream was filled with mud and sentiment, unfitting it for plaintiffs' use and causing by its deposits, injury to their ditches and reservoirs.

The defendants offered in evidence the notice posted by the plaintiffs with a view of limiting the plaintiffs' appropriation to an appropriation for the purposes and uses named in the notice, which were—

> "With a view and purpose of constructing and building a dam across said creek at said point with a view of diverting and turning the water out of the bed of said stream below said dam to the extent of four claims."

It was shown that no survey was made for a ditch below Slate Gulch at the time the notice was posted, nor for some time afterward, nor was notice given or trees blazed, or stakes set to mark such line.

The evidence showed that the plaintiffs had used the water for sluicing and other mining purposes in the bed of the creek between the dam and the Slate Gulch, but in the complaint it was not claimed that the diversion of the water by the defendants, injured the plaintiffs in connection with their use of the water at this point. The injury was claimed to go to the use of the water for irrigation purposes below Slate Gulch. The Court held that the notice posted, as well as all other facts proved, established

> "that at most the water was appropriated for a special and limited purpose, to-wit: the working of the bed and banks of the creek below the dam to the extent of four claims, or at the fartherest to the mouth of Slate Gulch,"

and that for that reason the action could not be maintained for damages for the causes set forth in the complaint which were, injury to the use of the water below Slate Gulch.

It was held that insofar as the object of the plaintiffs was to free the bed of the creek from water, there was no appropriation at all, and that insofar as the water was applied to use in sluicing and mining the claims lying between the dam and said Slate Gulch, the rightwas limited to a use at that particular point.

The Court say:

> "No *express* distinction is made by the plain-

> tiffs in their complaint or by the Court in its findings between the right of the plaintiffs to the use of so much water as might be necessary to work the bed of Clear Creek above Slate Gulch. But the plaintiffs allege that by their ditch they conducted the water on to mining grounds two miles below the dam, and the diagram shows the agricultural land to be still further below. It is for injury to the right to use the water at these localities that the complaint seeks redress. Slate Gulch is only one-half mile below the dam. In its findings the Court said: 'No survey was made for a ditch below Slate Gulch at that time (November, 1853) and for some time after, nor was any notice given, or tree blazed, or stakes set to mark such line.' "

The right of the plaintiffs was limited in this case by the terms of their notice, the Court having found that no surveys were run, stakes set or trees blazed, or any other evidences placed upon the ground of the ditch line below Slate Gulch.

The object of the appropriation as expressed in the notice in that case was in the first place to free the creek bed from water. To that extent, it was of course no appropriation at all, but beyond this the water also was applied for sluicing and other mining purposes. This of course constituted an appropriation, but the notice expressly stated that the object of the appropriation was the working of the four claims lying below the dam and there was no ditch line laid out below Slate Gulch

to indicate any other intention. Just as the Tripp notice in this case states that the water is to be applied at the Ebner mine, without marking upon the ground any ditch line to Shady Bend. In that case the Supreme Court of California held that the appropriation of the water for mining purposes was limited to mining carried on on these four claims, or at most, to mining carried on between the dam and Slate Gulch. In this case the appropriation of Tripp should be limited to an appropriation of the water at the mill site on the Lotta claim above appellant's dam and intake. (Petition, page 58.)

IN THE ABSENCE OF A STATUTE OR MINERS' RULE GOVERNING THE MATTER OF RELATION BACK, AN APPROPRIATOR'S RIGHT UPON APPLYING THE WATER TO USE DATES FROM THE TIME HE COMMENCED WORK AND NOT FROM THE TIME HE POSTED THE NOTICE

In most jurisdictions statutes have been passed, providing that if an appropriator posts and records a notice, and complies with all the other provisions of the statute, his right shall upon completion date back to the time the notice was posted. In these jurisdictions it is held that where an appropriation is made under a defective notice, or without a full compliance with some other provision of the stat-

ute, the doctrine of relation back has no application but the right of the appropriator dates from the time that the water was actually applied to use, and the appropriation fully completed.

Morris vs. Bean, 159 Fed. 651; (decided by this court);
Murray vs. Tingley, 30 Mont. 260; 50 Pac. 24;
Bailey vs. Tintinger, 122 Pac. 575;
Taylor vs. Abbott, 103 Cal. 421; 37 Pac. 408;
Wells vs. Mantes, 34 Pac. 324; 99 Cal. 583;
Denecochea vs. Curtis, 20 Pac. 563;
Nelson vs. Parker, 115 Pac. 489;
Crane Falls Power & Irrigation Co. vs. Snake River Irrigation Co. 103 Pac. 655;

In the absence of statute, miners' rules could of course be promulgated, providing for relation back to the time of posting such notice. Such rules, if in force would have the same effect as statutes and a failure to observe the provisions of the rules would be followed by the results that follow a failure to observe the provisions of the statutes.

Appellant plead the existence of a definite set of rules upon this subject and a failure to comply therewith on the part of the appellee. Many witnesses were called who testified in relation to the adoption of the rules, and their continual observance by the miners of the district. It was shown

that these rules were published in pamphlet form from time to time by attorneys practicing at Juneau; that the records kept by the recorder showed that they were uninterruptedly observed; that upon the trial of cases involving water rights they were relied upon as a basis for the decision, and that when this cause was up for a hearing on an application for a preliminary injunction, the appellees themselves invoked these rules in an attempt to sustain their position.

Appellees met this proof by calling the witness Ebner, who testified that in his opinion the rules had fallen into disuse. Upon cross examination, however, this witness testified to facts showing that he, himself, had always substantially complied with the rules in locating water rights. Appellee also called some other witnesses who testified that they knew nothing about the rules.

Upon this testimony the Trial Court found that the rules were never adopted, or if adopted, that they had fallen into disuse. There being some conflict in the testimony upon the subject, this Court did not feel that they should set the finding aside.

We think that in the light of the Alaska statute, relating to the right of this Court to review findings in equity cases, hereinbefore referred to, they would have the right to set the finding aside; but assuming that the Trial Court was right in holding that the rules had fallen into disuse, the

appellee would be in no better position than it would have been had the rules been in force. The rules provided for relation back to the time the notice was posted, if the prescribed conditions were complied with, but if the rules were not in force, then from whence comes the right to relate back to the time of posting the notice?

The Trial Court found that it was the custom to post a written notice, but the Court did not find that there was any custom under which the right of the appropriator would, under prescribed conditions, or at all, date back to the time of the posting of the notice; nor was there any evidence upon this subject. Even had the Court so found, this finding would have to be accompanied by a further finding that the conditions named had been complied with.

In the western states where the doctrine of appropriation arose, an appropriator of water was, prior to the adoption of statutes and rules upon the subject, required to give notice of his intended appropriation, if he desired to invoke the doctrine of relation back. But in these jurisdictions the giving of notice did not entitle him to relate back to the time the notice was given, but to the time he commenced work. In fact, the object of posting the notice was to apprise others of the purpose with which the work was carried on. The giving of notice and commencement of work were contemporaneous acts. The notice might be given by posting a printed or written notice at the point of

diversion, by blazing trees, driving stakes, or placing upon the ground any other unmistakable evidence of the appropriator's intention.

Kimball vs. Gearhart, 12 Cal. 29;
Osgood vs. Water & Mining Co. 56 Cal. 571;

By the custom in Alaska, under the Court's decision, an appropriator was required to post a notice. Under this decision a notice might be posted and supplemented by evidences upon the ground, but the evidences upon the ground were to be supplemented, if used at all, by a notice.

The effect of giving notice is so different in Alaska from what it is in California and other western states prior to the adoption of rules or statutes.

The common law doctrine of riparian rights was for obvious reasons, not suited to conditions existing in California and other western states, hence, the doctrine of appropriation arose at a very early time. There were then no laws under which titles to land could be acquired. The land as well as the water flowing thereon belonged to the general government and the rights exercised in relation thereto by the early settlers were mere possessory rights. The first occupier or possessor had the better right because possession was regarded as an evidence of title, and, since none except the government could produce any other evidence, the possessor had the only evidence

available, and was accordingly protected in his possession. This doctrine applied to the possession of land and water alike; it was the actual possession only that gave the right.

Kelly vs. Natoma Water Co. 6 Cal. 105; In deciding this case, it was said:

> "Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows, such appropriation cannot be constructive because there would be no rule to limit or control it, resting as it must only on intention. The design of the defendants, two years before, to appropriate Alder Creek as a connecting link of their enterprises, could not give them exclusive rights until it was executed, *because it is not the intention to possess, but the actual possession which give the right.* And so, in the case of Starks vs. Barnes, 4 Cal. 412, cited by appellants, the doctrine of relation, as between the acts of the plaintiff, first and last, was simply applied *'to the thing possessed'* and *'not to the intention of possessing.'*

A posted notice is no more than an evidence of the intention of the party to appropriate or take possession of the water. After the posting of a notice, the person posting it is no nearer the actual possession of the water than he was before he had posted it and the possession that is recognized by the Courts, as was stated in Kelly vs. Natoma Wa-

ter Company, must be actual and not constructive. While the notice evidences an intention to possess, it does not place the water under the control of the person posting it, and does not aid or assist him in that direction. Ditches, dams and other contrivances used in that connection have this effect, but notices do not. Accordingly, it was held in an early case in California, that since the possession of water could only be acquired by building ditches, dams and other like structures, a person commencing actual work on these structures was taking the necessary steps to reduce the water to possession, and further that if he carried on his work with diligence and actually reduce the water to possession, his possession would date from the time of taking the first steps to actually reduce the water to possession. That is to say, from the time he commenced work.

The custom naturally arose to post notices so as to inform others in regard to the nature and character of the work that was being carried on, and that it was for the purpose of reducing water to the possession of the party doing the work, and to otherwise define, limit and explain the character and extent of the possession that the person doing the work expected to have upon its completion. For all these purposes, the notice might be useful and in some cases necessary, but such notice had nothing to do with the work of reducing the water to possession. It was not a step in

that direction. At most, it was a mere declaration of an intention to take such steps. The statements in some cases, that upon completion, the right relates back to the taking of the first step, refers to the taking of the first step necessary to reduce the water to possession. That is to say, to the commencement of actual work.

This is the doctrine laid down in the case of Conger vs. Weaver, 6 Cal. 548; where it was held that the right to the possession of water after the same had been fully possessed, dated from the time that the first step was taken to reduce it to possession—the first thing necessary to be done in order to give an appropriator actual possession and control of the water.

One who has posted a notice merely has not taken a step in that direction; he has simply declared his intention to take such steps as may be necessary in that regard, and as was said in Kelly vs. Natoma Water Company, "it is not the intention to possess, but the actual -possession which gives the right," and again in the same case, "the doctrine of relation as between the acts of the plaintiff, first and last, was simply applied to the thing possessed and not to the intention of possessing."

The right, therefore, in the absence of miners' rules or statutes providing otherwise, dates from the commencement of the work, that being

that time when the first step is taken to reduce the water to possession.

Irwin vs. Straite, 4 Pac. 1215;
Union Milling-Mining Co. vs. Danberg, 81 Fed. 73;
Stieber et al vs. Frink et al, 2 Pac. 901;
Kimball vs. Gearhart, 12 Cal. 29;
Nevada County & Sacramento Canal Co. vs. Kidd, 37 Cal. 282;
Sandpoint Water & Light Co., vs. Panhandle Development Co. 83 Pac. 347;
Nevada Ditch Co. vs. Bennett, 43 Pac. 472 and 482.

The appellant in this case posted its notice and commenced work on the same day, August 1, 1910. Appellee did not commence work until afterwards. Appellant worked continuously and applied the water to use on November 17, 1910, at the Snow Gulch compressor, and as soon as the flume and tunnels necessary for that purpose could be completed, also applied the water to use at its mill site on the shore of Gastineau Channel. Appellee commenced work some time after appellant had commenced work—worked spasmodically, and did not apply the water to use until appellant had not only applied it at the Snow Slide Gulch compressor, but also at its mill site on the shore of Gastineau Channel. Appellant therefore, was the first to commence work and the first to complete its appropriation by applying the water to the beneficial use designed.

It follows, therefore, that even though the Tripp notice had been posted at a point where the public had a right to go so that one could, without becoming a trespasser, become informed in regard to its contents; even though the notice had not been torn down in July but had been kept posted so that it could serve as a notice on August 1, 1910; even though on August 1st appellant had knowledge of the Tripp notice; even though the decision to build a mill at Shady Bend had not been delayed until August 6th but had been arrived at before the Tripp notice was posted; even though the Tripp notice instead of indicating a clear intention to apply the water at the new mill on the Lotta, had stated in express terms that it was the intention to convey the water to Shady Bend; even though the appellant had not been in complete ignorance of all these things, but had actual knowledge, the right of appellant would still be prior in time to that of appellee for appellant was the first to commence work.

AS TO THE CHARACTER OF THE WORK DONE BY APPELLANT

The first work done by appellant was of a preliminary character. While it did not consist of the actual construction of the dam or flume, it consisted of doing those things which conditions existing on the ground made necessary before the

actual construction of the dam and flume could be commenced.

There is no dispute in the evidence but what the character of the country in the vicinity of Snow Slide Gulch is such that the building of trails, steps, and other like conveniences to enable the men to reach the hillside and to convey material thence, as well as the construction of a bunk house in which to house the men, had to be done before actual construction work on the dam and flume could be commenced. And it was further shown and the fact was not contradicted, that this work was as necessary in connection with a flume grade, commencing at the Alaska Juneau dam as it would have been in connection with a flume grade commencing at the point where the Lotta notice was posted, or any other point in that vicinity, whether a trifle higher up or a trifle lower down.

Not only was the preliminary work carried on continuously, but as early as the month of August, and before the preliminary work was completed, and while it was still being carried on diligently, a tunnel was commenced, through which it was designed to construct a flume. This tunnel was on the ground claimed by the appellee under the Parrish location and the appellant under the Oregon location.

According to the testimony of Superintendent Kinzie, this tunnel was commenced some time

during the latter part of August. It is possible that its elevation was determined upon before it was learned that the Mulligan notice had been posted on the Lotta.

On August 28th after suit had been commenced against the appellant, a survey was made on the ground with a view of determining the lower side line of the Lotta. (See evidence Lindsay, record page 1454.)

This survey was made commencing at a well known point on the Idaho claim which in its patent description was tied to the Lotta and it was found by locating the Lotta in this manner the Mulligan notice would not be on the Lotta claim.

(See evidence, Lindsay, record page 1457, et seq.)

It was claimed, however, on the part of appellee that the location of the Lotta claim on the ground was determined by certain stakes which brought the southerly side line further down. A hearing was had upon an application for a temporary injunction, which brought out the contentions of the parties upon this subject some time prior to September 2d, that being the date of the Court's opinion denying the injunction. (See opinion, record page 2040.) Thereafter Surveyor Lindsey was directed to establish a flume grade and found that if a dam were placed in the creek at a sufficient elevation to carry the water through the tunnel that had been commenced, the

dam would be on the Lotta claim if it were conceded that the claim of appellees in regard to the location of the boundary were correct. Accordingly, to be sure that the tunnel would not be upon the Lotta, a new survey was made and a new tunnel started. The witness Lindsey on page 1452 testified as follows:

> "Q. You established a grade for the flume grade about September 12th, you and Mr. Wayland?"
>
> "A. About that, yes. That is the reason the dam was moved down and the flume was put in the present position. We wanted to be sure to be off the Lotta claim."
>
> "Q. And the dam was moved down in view of the survey you and Mr. Wayland made there on September 12th?"
>
> "A. It was to be sure to be off the Lotta claim."

The witness here speaks of moving the dam, whereas, what he meant to say was that the survey for the dam was moved, no dam having as yet been constructed.

Upon this point, he testified as follows, on page 1454:

> "Q. Mr. Lindsey, you stated that you were given instructions to be sure and keep the dam off the Lotta—I think you made a statement in answer to Judge Winn's question that was the occasion for moving the dam; was it for moving the dam or moving the survey of the dam?"

"A. If I made such a statement I didn't intend to; all that was done was making another survey."

"Q. The dam itself was never moved?"

"A. There was no dam in there at that time."

In further explaining the reason why the work on the upper tunnel was abandoned and a new tunnel started, the witness testified on page 1455 as follows:

"Q. What survey was this you made on September 12, 1910?"

"A. "I ran a level line from the upper water tunnel up the creek for the grade; when I found it was too high for the position of the dam. I reported it to Mr. Kinzie and he told me to make another survey and move it down; that is where the second tunnel was started, and the dam was put where it is now."

"Q. Don't you know that upper tunnel was started with the expectation of taking water off the Lotta claim?"

"A. I do not, no sir—the upper tunnel?"

"Q. You know if you had run that grade on the grade of the upper tunnel it would have taken the water of the Lotta claim approximately where the Mulligan notice is posted?"

"A. It would have taken it from there some place; that is why it was moved down."

The work on the upper tunnel was of course wasted. But it must be remembered that while all

of this was going on, Harri and those working with him, continued the work of building trails and other conveniences to enable the men to get around on the hillside and that this work was as necessary in connection with a flume on one grade as another.

In the case of Sandpoint Water & Light Co. vs. Panhandle Development Co. 83 Pac. 347, the work of building and constructing trails as preliminary to the actual work on the dam and flume, under conditions very similar to those pertaining to the case at bar, was held to be effectual and sufficient. And in the case of the Sumner Lumber & Shingle Co. vs. Pacific Coast Power Co. 131 Pac. 221, it was held that the right upon completion

> "related back to the first substantial act of the appropriator for the acquisition of the right, whether that act be the actual commencement of construction work, or other necessary work incident thereto."

It would seem clear even in the absence of authority upon the subject that whenever physical condition were such that actual work on the dam, flume or ditch could not be commenced until preliminary work of the character here done had been completed, the preliminary work would be as effectual for all purposes as work on the dam of flume itself. If it were otherwise, the rights flowing from the diligent prosecution of work would not inure to the appropriator as a result of his diligence and good

faith, but would attach only if the natural conditions were such that work on the dam or flume could be commenced at once. They would exist not because of the appropriator's diligence and good faith, but because of favorable natural conditions.

THE LEGAL EFFECT OF THE FACT THAT APPELLANT'S NOTICE WAS POSTED ON THE LOTTA CLAIM

As has already been pointed out, the posting of the Mulligan notice upon the Lotta claim was the result of a mistake; but even though it had been done intentionally that fact would not affect appellant's rights; even though a dam was installed on the Lotta and a ditch or flume had been constructed across it, the validity of appellant's water right would not be affected thereby.

It was so held by the Supreme Court of the United States in the case of Boquillas Land & Cattle Co., vs. Curtis, 213 U. S. 339; 29 Sup. Crt. Rep. 493. In that case a water right by appropriation was held to be valid as against the riparian owner, notwithstanding the fact that the water was taken from the land of the riparian owner, diverted by means of a dam situated on the riparian owner's land, and conveyed through ditches dug across the same, all of which had been done long after the riparian owner had acquired his patent. The suit was for an injunction to prevent the withdrawal of water from the San Pedro river and the build-

ing for that purpose of a dam and ditch upon and through the plaintiff's land.

The plaintiff owned a tract extending on both sides of the river for about fourteen and one-half miles and reaching back from the river for a mile and one-eighth on each side. It derived its title from a grant of the state on Sonora in 1833, and confirmed by a decree of the court of private land claims in 1899, and a patent of the United States inpursuance of the decree in 1900. Plaintiff had not appropriated the water, although the water would be required for the irrigation of its lands. The defendants threatened to and intended to build a new dam on plaintiff's land in place of the one originally constructed in 1903, but washed out, and to build and rebuild a ditch through the land of the plaintiff to another ditch already established and to divert the water through the same to lands of theirs on the north. They set up no title except that they had been the first to appropriate the water.

The statutes of Arizona provided for appropriation, and also for the right to construct ditches across the lands of others and provided that if parties whose lands were crossed were damaged, such parties might go before the probate court and have their damages assessed in a summary manner.

This statute is similar in effect to the ninth Section of the Act of 1866 in force in Alaska. (See Jamison vs. Kirk 98 U. S. 453.)

It was urged before the Supreme Court of the United tSates that the taking of land under this statute was the taking of property without due process. The Court held that this objection was merely technical, that while the dam and ditch were built on plaintiff's land, the water sought to be appropriated was the principal thing in dispute.

The defendant's right to the use of the water by appropriation was confirmed, notwithstanding the fact that his dam and ditches were built across the plaintiff's land and a decree of the State Court dismissing the plaintiff's bill was affirmed.

So also, in the case of State vs. Superior Court, 126 Pac. 945; it was urged that a water notice posted upon the lands of a railroad company to appropriate the waters of a lake lying in front of these lands, was such that it could confer no rights upon the party posting the notice, since a trespass resulted from going upon the lands of another to so post the notice.

The Court held that this contention was without merit, for the reason that the person posting the notice was not thereby seeking to acquire the ground upon which it was posted, but was seeking merely to acquire a water right.

The Court say:

> "When the relator caused the appropriation notices to be posted, it was not thereby seeking to acquire the ground upon which they were

> posted, but was seeking only to acquire a water right, which it had an equal right with the railroad company, Pettigrew and all others to acquire by appropriation."

The notice in this case, as in the case under discussion, is a notice appropriating the water. Under it no claim to the land itself is laid, and as already shown, no work whatever was ever done on the Lotta, but even if the ditches and flumes had been built across that claim, that would not affect appellant's water right under the authority of Boquillas Land & Cattle Co. vs. Curtis, 29 Sup. Crt. Rep. 493.

In the light of what has been said, therefore, it must be conceded that appellant's notice, although posted on the Lotta claim, was a full compliance with the custom requiring the posting of a notice and that the notice, more especially when taken in connection with the survey line previously placed upon the ground, gave explicit notice of appellant's intention; for, as under the facts in the case of Osgood vs. Mining & Milling Co., any one going upon the ground would find the notice and from it would learn that appellant intended to appropriate twenty thousand inches of water for mining purposes; and looking further, he would find the survey line established on the ground on the 11th of July, and following this line he would be led to the site of the compressor at Snow Slide Gulch and appellant's millsite on the shore of the Gastineau

Channel, the places where the water was designed to be applied to use.

This fact coupled with the further fact that appellant commenced work on the same day that the notice was posted and prosecuted this work to completion with the highest degree of diligence, entitled the appellant to invoke the doctrine of relation back, and claim a water right as of August 1, 1910.

Appellant's right, however, under the facts in the case would be first in point of time, even though it were not entitled to invoke the doctrine of relation back. It applied the water to use on November 17, 1910; on that day it acquired a complete water right by appropriation. Appellee on the other hand, did not apply the water to use until some two years later. Even if it should be conceded that the Tripp notice was the notice of appellee, it is not disputed that that notice was posted at a point where it would be notice to no one except a trespasser; it is not disputed that the notice had been torn down and was not posted on August 1st, when appellant's rights attached and that appellant had no knowledge of the fact that it ever existed until several months later; nor was it stated in the notice that it was the intention to convey the water to Shady Bend. The Ebner mine was the only definite place named in the notice as a place of use and the indications on the ground all pointed to the fact that it was the intention to

use the water on the Lotta claim in accordance with the plans of the Ebner Company communicated to appellant.

The notice originally posted, therefore, was not a notice of an intention to convey the water to Shady Bend but of an intention to convey the water to the Lotta, so that an appropriation under it would not interfere with the application made by appellant; but from and after the time the notice was torn down the appellee had no posted notice to relate back to, for as has been shown, a notice to be effective must be kept posted at least as against a subsequent appropriator in good faith without knowledge. This being true, the rights of appellee would date not from the time Tripp posted the notice, nor yet from the time appellee commenced work, for it had at that time no notice posted as required by custom, but from the time that the water was applied to use, which was some two years after it had been applied by appellant.

It is not necessary, therefore, that the appellant in order to maintain its position, need invoke the doctrine of relation back—it was in any event first in time and hence first in right.

THE POINT THAT APPELLEE WAS IN NO EVENT ENTITLED TO MORE THAN THIRTY-TWO HUNDRED MINERS' INCHES, THE CAPACITY OF ITS FLUME, WAS DULY RAISED AT THE TRIAL

Conclusion of Law No. 1 reads as follows:

> "That as against the plaintiff, the defendant is the owner of, and entitled to the first use of ten thousand miners' inches of water to be taken from Gold Creek at or in the vicinity of the place where the Tripp notice was posted."

This conclusion was objected to and exception taken to it on the ground that it was not warranted by the facts as found by the Court and also on the other grounds as stated in the record. (See record page 2674.) Notwithstanding this objection, the conclusion was adopted by the court and a decree based thereon. This erroneous action of the Court was assigned as error. This, we think presented the point fully, without making a motion to amend the decree.

For the reasons stated appellant respectfully petitions this Honorable Court for a rehearing herein, in order that the matters herein referred to may be fully presented to the Court for consideration.

The fact that a reply brief was not filed com-

pelled us to trespass upon the time of the Court to a greater extent than would have otherwise been necessary. We ask the indulgence of the Court bcause of this fact, coupled with the further fact, that the matter in dispute is one of the highest importance to our client. According to the testimony of the witnesses, its new milling plant has approximately double the capacity of the Treadwell plant, heretofore considered as among the largest in the world. The fact that the fresh water supply for this plant is involved in this suit accounts for our solicitude and has led us to burden the Court with many details that would ordinarily not be referred to in a petition for a rehearing.

J. A. HELLENTHAL.
CURTIS H. LINDLEY.
HELLENTHAL & HELLENTHAL.
Attorneys for Appellant.

The understigned, J. A. Hellenthal, hereby, CERTIFIES that he is one of the attorneys for appellant, and that in his judgment the above and foregoing petition for rehearing is well founded and that it is not interposed for delay.

J. A. HELLENTHAL,
Attorney for Appellant.